

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
PLAINTIFF,)
VS.)
RAMESH "SUNNY" BALWANI,)
DEFENDANT.)
) CR-18-00258-EJD
) SAN JOSE, CALIFORNIA
) MAY 23, 2022
) VOLUME 33
) PAGES 6418 - 6504

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN C. BOSTIC
JEFFREY B. SCHENK
150 ALMADEAN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH
KELLY VOLKAR
1301 CLAY STREET, SUITE 340S
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP
BY: SHAWN ESTRADA
THE ORRICK BUILDING
405 HOWARD STREET
SAN FRANCISCO, CALIFORNIA 94105

BY: JEFFREY COOPERSMITH
AARON BRECHER
701 FIFTH AVENUE, SUITE 5600
SEATTLE, WASHINGTON 98104

BY: STEPHEN CAZARES
77 SOUTH FIGUEROA STREET, SUITE 3200
LOS ANGELES, CALIFORNIA 90017

BY: AMY WALSH
51 W 52ND STREET
NEW YORK, NEW YORK 10019

ALSO PRESENT:

PROLUMINA
BY: CHRISTIAN
2200 SIXTH AVENUE, SUITE 425
SEATTLE, WASHINGTON 98121

UNITED STATES POSTAL INSPECTION SERVICE
BY: CHRISTOPHER MCCOLLOW

FEDERAL BUREAU OF INVESTIGATION
BY: MARIO C. SCUSSEL

UNITED STATES FOOD & DRUG
ADMINISTRATION
BY: GEORGE SCAVITS

1 SAN JOSE, CALIFORNIA MAY 23, 2022

2 P R O C E E D I N G S

08:36AM 3 (JURY OUT AT 8:36 A.M.)

08:36AM 4 (COURT CONVENED AT 8:36 A.M.)

08:36AM 5 THE COURT: THANK YOU FOR YOUR COURTESY.

08:36AM 6 LET'S GO ON THE RECORD IN THE BALWANI MATTER.

08:36AM 7 ALL COUNSEL ARE PRESENT. MR. BALWANI IS PRESENT.

08:36AM 8 WE ARE OUTSIDE THE PRESENCE OF THE JURY TO TAKE UP A

08:37AM 9 MOTION THAT WAS CALENDARDED.

08:37AM 10 ALL RIGHT. LET'S TALK ABOUT DOCUMENT 1440, WHICH IS THE

08:37AM 11 GOVERNMENT'S MOTION TO EXCLUDE LIS RELATED TESTIMONY AND

08:37AM 12 EVIDENCE; THE OPPOSITION IS 1448; AND THE REPLY IS 1454.

08:37AM 13 I HAVE THOSE IN FRONT OF ME. THANK YOU.

08:37AM 14 LET ME FIRST HAVE YOU STATE YOUR APPEARANCE, PLEASE.

08:37AM 15 MS. VOLKAR: GOOD MORNING, YOUR HONOR.

08:37AM 16 KELLY VOLKAR ON BEHALF UNITED STATES.

08:37AM 17 THE COURT: THANK YOU. GOOD MORNING.

08:37AM 18 MR. BRECHER: GOOD MORNING, YOUR HONOR.

08:37AM 19 AARON BRECHER FOR MR. BALWANI, WHO IS PRESENT IN THE

08:38AM 20 COURTROOM, ALONG WITH MY COLLEAGUES.

08:38AM 21 THE COURT: THANK YOU. GOOD MORNING.

08:38AM 22 THIS IS THE GOVERNMENT'S MOTION TO EXCLUDE LIS RELATED
08:38AM 23 TESTIMONY AND EVIDENCE BY MR. SONNIER, SONNIER?

08:38AM 24 MR. BRECHER: SONNIER. THANK YOU, YOUR HONOR.

08:38AM 25 THE COURT: MR. SONNIER. MR. SONNIER WAS AN EXPERT

08:38AM 1 THAT THE DEFENSE RETAINED.

08:38AM 2 SO AS I UNDERSTAND IT, THE DEFENSE WOULD LIKE TO PUT THIS

08:38AM 3 WITNESS ON AS AN EXPERT TO TESTIFY ABOUT SQL, I THINK IT IS,

08:38AM 4 AND ABOUT THE ABILITY -- THIS WITNESS'S OPINION THAT THE

08:38AM 5 DATABASE COULD HAVE BEEN REASSEMBLED AND OTHERWISE BEEN MADE

08:39AM 6 PRODUCTIVE.

08:39AM 7 IS THAT WHAT HE'S GOING TO DO?

08:39AM 8 MR. BRECHER: IN GENERAL TERMS, YOUR HONOR, YES.

08:39AM 9 THE COURT: LET'S TALK SPECIFIC TERMS.

08:39AM 10 MR. BRECHER: THAT'S WHAT I WAS TURNING TO,

08:39AM 11 YOUR HONOR.

08:39AM 12 MR. SONNIER IS AN EXPERT IN SQL, I BELIEVE IT IS COMMONLY

08:39AM 13 PRONOUNCED SQL SERVER DATABASES, DATA ENCRYPTION, AND DATA

08:39AM 14 RECOVERY. THE SUBSTANCE OF HIS ANTICIPATED TESTIMONY CLOSELY

08:39AM 15 TRACKS THE DECLARATION THAT IS ALREADY ON FILE AS

08:39AM 16 DOCUMENT 1158.

08:39AM 17 THE COURT: SO WHEN YOU SAY, "CLOSELY TRACKS," I

08:39AM 18 WANT TO BRING YOU BACK TO SPECIFICS, PLEASE.

08:39AM 19 MR. BRECHER: SO WHAT MR. SONNIER WOULD SAY IS --

08:39AM 20 FIRST OF ALL, WE WOULD LAY -- WE WOULD ESTABLISH THE CONTEXT

08:39AM 21 FOR WHAT HAPPENED HERE, THAT THERE WAS A COPY THAT WAS

08:39AM 22 DELIVERED TO THE UNITED STATES GOVERNMENT.

08:39AM 23 THAT COPY WAS ENCRYPTED. THAT ENCRYPTION KEY WAS NOT

08:39AM 24 PROVIDED. NO ONE, SO FAR AS WE CAN TELL, HAS BEEN ABLE TO OPEN

08:39AM 25 IT, AND WE DON'T SEE ANY PROSPECTS OF ANYONE BEING ABLE TO OPEN

08:39AM 1 IT.

08:39AM 2 BUT WHAT MR. MR. SONNIER IS GOING TO SAY IS DESPITE THAT

08:39AM 3 FACT, AND DESPITE THE DISASSEMBLY OF THE LIS SYSTEM

08:39AM 4 ARCHITECTURE FOUR DAYS LATER, THAT WOULD NOT HAVE PREVENTED THE

08:40AM 5 GOVERNMENT FROM SEIZING THE ORIGINAL SERVERS AND DRIVES AND

08:40AM 6 REASSEMBLING THE LIS UNDER WHICH -- OH, PLEASE, YOUR HONOR.

08:40AM 7 THE COURT: SO THIS IS WHERE I WOULD LIKE TO CUT TO

08:40AM 8 THE CHASE SO TO SPEAK.

08:40AM 9 MR. BRECHER: SURE.

08:40AM 10 THE COURT: HE CAN TESTIFY ABOUT, FROM YOUR

08:40AM 11 PERSPECTIVE, ABOUT HIS VAST KNOWLEDGE ABOUT THE SQL, AND HOW,

08:40AM 12 IN HIS OPINION, "EVEN IF IT WAS DISASSEMBLED, LADIES AND

08:40AM 13 GENTLEMEN, IT ACTUALLY COULD BE REASSEMBLED." AND HE WOULD

08:40AM 14 TALK ABOUT THAT BASED ON HIS UNIVERSE OF KNOWLEDGE.

08:40AM 15 BUT ARE YOU ALSO TELLING ME THAT YOU WOULD ASK HIM

08:40AM 16 QUESTIONS ABOUT THE GOVERNMENT'S HANDLING OF THE -- WHATEVER

08:40AM 17 THEY HAD?

08:40AM 18 MR. BRECHER: YES AND NO, YOUR HONOR.

08:40AM 19 I SUPPOSE TO YOUR QUESTION, I BETTER BE SPECIFIC TO MAKE

08:40AM 20 SURE THAT I'M CLEAR ON WHAT WE'RE SAYING.

08:40AM 21 THE COURT: RIGHT.

08:40AM 22 MR. BRECHER: I DON'T SEE THAT MR. SONNIER WOULD BE

08:40AM 23 ASKED QUESTIONS ABOUT THE GOVERNMENT'S HANDLING OF THE

08:40AM 24 ENCRYPTED COPY, OTHER THAN TO PROVIDE SOME FACTUAL CONTEXT FOR

08:40AM 25 THE JURY TO UNDERSTAND THAT THERE WAS THIS COPY PROVIDED, BUT

08:41AM 1 IT WAS INACCESSIBLE THROUGH NO FAULT OF THE GOVERNMENT, AND AS
08:41AM 2 WE WOULD CONTEND, THROUGH NO FAULT OF MR. BALWANI.

08:41AM 3 THE COURT: SO HE THE WITNESS THAT WOULD LAY THAT
08:41AM 4 FOUNDATION?

08:41AM 5 MR. BRECHER: I THINK SO, YOUR HONOR.

08:41AM 6 THE COURT: HOW? HOW WOULD HE DO THAT?

08:41AM 7 MR. BRECHER: OH, WELL, SURE, YOUR HONOR.

08:41AM 8 FIRST OF ALL, AS YOU KNOW, EXPERTS ARE ALLOWED TO RELY ON
08:41AM 9 MATERIALS THAT MAY NOT THEMSELVES BE ADMISSIBLE.

08:41AM 10 THE COURT: SO HE CAN TESTIFY AS AN EXPERT ON THE
08:41AM 11 SQL -- IS THAT WHAT IT IS, SQL?

08:41AM 12 MR. BRECHER: SQL SERVERS --

08:41AM 13 THE COURT: RIGHT.

08:41AM 14 MR. BRECHER: AND DATA ENCRYPTION, YES.

08:41AM 15 THE COURT: SO HE CAN TESTIFY ABOUT THAT. HE CAN
08:41AM 16 RELY ON HEARSAY. AS WE KNOW, EXPERTS CAN RELY ON HEARSAY.

08:41AM 17 BUT IF YOU'RE GOING TO ASK HIM TO COMMENT ABOUT THE
08:41AM 18 GOVERNMENT'S INVESTIGATION, WHAT THEY HAD, WHEN THEY GOT IT,
08:41AM 19 WHAT THEY COULD HAVE DONE, THAT'S FACT TESTIMONY, IT SEEMS TO
08:41AM 20 ME, AND THAT'S WHERE THERE'S A DEPARTURE FROM HIS EXPERT
08:41AM 21 TESTIMONY.

08:41AM 22 MR. BRECHER: I THINK SO, YOUR HONOR, AT LEAST
08:41AM 23 POSSIBLY. BUT I DON'T THINK THAT THAT'S AN ISSUE HERE, AND
08:41AM 24 I'LL EXPLAIN WHY.

08:41AM 25 THE COURT: YOU KNOW, WHY I'M RAISING IT, AND JUST

08:41AM 1 BECAUSE THAT'S WHAT I'VE DISCERNED FROM YOUR PLEADINGS.

08:41AM 2 ONE OF THE PLEADINGS SEEMS TO SUGGEST THAT WE INTEND TO

08:42AM 3 ASK THE GOOD DOCTOR WHY THE GOVERNMENT DIDN'T DO WHAT THEY DID,

08:42AM 4 AND THEY COULD HAVE DONE IT IF THEY HADN'T DONE X, AND, YOU

08:42AM 5 KNOW, BE CRITICAL OF THEIR INVESTIGATION.

08:42AM 6 AND I WAS CURIOUS, ARE YOU GOING TO PUT HIM ON FOR THAT

08:42AM 7 PURPOSE?

08:42AM 8 MR. BRECHER: YES, YOUR HONOR, AT LEAST A CERTAIN

08:42AM 9 VERSION OF IT. I WANT TO BE CLEAR.

08:42AM 10 THE COURT: YES, THIS IS A GOOD TIME TO BE CLEAR.

08:42AM 11 IT'S A GOOD TIME FOR CLARITY.

08:42AM 12 MR. BRECHER: AND I HOPE THAT WE WERE IN THE COURSE

08:42AM 13 OF HIS DECLARATION AND IN OUR PLEADINGS.

08:42AM 14 BUT, FIRST OF ALL, THE FACTUAL FOUNDATION FOR THAT

08:42AM 15 EVIDENCE IS CLEARLY ADMISSIBLE. IT IS THE GOVERNMENT'S BRADY

08:42AM 16 LETTER. THIS IS AN 801(D) PARTY ADMISSION. IT'S A STATEMENT

08:42AM 17 BY THE DEPARTMENT OF JUSTICE IN THIS LITIGATION.

08:42AM 18 I BELIEVE THAT THAT DOCUMENT, YOUR HONOR, WAS SIGNED BY

08:42AM 19 MR. LEACH.

08:42AM 20 THE COURT: SO LET ME ASK -- I KEEP INTERRUPTING YOU

08:42AM 21 AND I BEG YOUR PARDON.

08:42AM 22 MR. BRECHER: NO PROBLEM.

08:42AM 23 THE COURT: BUT I THINK FOR PURPOSES OF OUR

08:42AM 24 DISCUSSION, WOULD YOU BE WILLING TO TELL US TODAY HOW YOU

08:42AM 25 INTEND TO GET THAT EVIDENCE IN?

08:42AM 1 AND IF YOU'RE NOT -- I'M NOT ASKING YOU TO REVEAL ANY
08:43AM 2 DEFENSE STRATEGY OR DEFENSE -- ANYTHING IN YOUR -- THAT YOU
08:43AM 3 DON'T WANT TO DO. I'M NOT ASKING YOU NOR ORDERING YOU TO DO
08:43AM 4 THAT AT ALL.

08:43AM 5 I WOULD JUST LIKE TO KNOW STEP BY STEP HOW YOU FORESEE
08:43AM 6 EVIDENCE COMING IN.

08:43AM 7 I SEE HIM ON THE LATTER, AS A SQL EXPERT, AND HE WILL
08:43AM 8 TESTIFY ABOUT HIS VAST KNOWLEDGE OF SQL, AND KNOWLEDGE OF
08:43AM 9 DATABASES, AND ALL OF THOSE THINGS. AND HE'LL TESTIFY THAT HE
08:43AM 10 UNDERSTANDS THE DATABASE WAS DISASSEMBLED. IT WAS GONE.

08:43AM 11 HOWEVER, BASED ON HIS VAST KNOWLEDGE, HIS OPINION IS THAT
08:43AM 12 IT COULD HAVE BEEN PUT BACK TOGETHER SUCH THAT INFORMATION
08:43AM 13 COULD HAVE BEEN RETRIEVABLE.

08:43AM 14 HE'S GOING TO SAY THAT I TAKE IT?

08:43AM 15 MR. BRECHER: YES.

08:43AM 16 THE COURT: OKAY. SO WE PUT HIM THERE.

08:43AM 17 AND THEN WHAT ABOUT THE TOP AND BOTTOM OF THAT? HOW DO WE
08:43AM 18 GET TO THE FOUNDATION OF ANYTHING ELSE THAT YOU WOULD LIKE HIM
08:43AM 19 TO TESTIFY ABOUT?

08:43AM 20 MR. BRECHER: SURE. WELL, TWO POINTS ON THAT,
08:44AM 21 YOUR HONOR.

08:44AM 22 THE COURT: AGAIN, DON'T REVEAL ANYTHING YOU DON'T
08:44AM 23 WANT TO. AND IF YOU WANT TO CONSULT WITH YOUR PARTIES, PLEASE
08:44AM 24 DO SO, BUT I'M NOT ASKING YOU TO REVEAL ANY DEFENSE STRATEGIES
08:44AM 25 AT ALL.

08:44AM 1 MR. BRECHER: I APPRECIATE THAT, YOUR HONOR.

08:44AM 2 I THINK WE FEEL COMFORTABLE SHARING IN SOME DETAIL HOW AND

08:44AM 3 WHY WE WOULD GO ABOUT ESTABLISHING IT BECAUSE IT'S IMPORTANT TO

08:44AM 4 UNDERSTANDING THE VIABILITY OF THIS DEFENSE.

08:44AM 5 AND THERE ARE TWO ISSUES TO BEAR IN MIND, YOUR HONOR.

08:44AM 6 FIRST, OUT OF FAIRNESS TO THE GOVERNMENT, WE FEEL THAT WE

08:44AM 7 MUST LAY THE APPROPRIATE FOUNDATION TO SHOW THAT THERE WAS THIS

08:44AM 8 ENCRYPTED COPY THAT WAS GIVEN THAT NO ONE COULD OPEN BECAUSE

08:44AM 9 WE'RE NOT GOING TO BLAME THE GOVERNMENT FOR THAT.

08:44AM 10 THE COURT: SURE.

08:44AM 11 MR. BRECHER: THAT WOULD BE INAPPROPRIATE.

08:44AM 12 THE COURT: SURE. AND HOW DO YOU DO THAT?

08:44AM 13 MR. BRECHER: WELL, THROUGH THE BRADY LETTER,

08:44AM 14 YOUR HONOR, WHICH ESTABLISHES ALL OF THESE PIECES.

08:44AM 15 THE COURT: AND HOW DO YOU DO THAT?

08:44AM 16 MR. BRECHER: I'M SORRY, YOUR HONOR?

08:44AM 17 THE COURT: YOU WANT TO INTRODUCE THE BRADY LETTER?

08:44AM 18 MR. BRECHER: NOT NECESSARILY ALL OF THE LETTER,

08:44AM 19 YOUR HONOR. I THINK THAT THE --

08:44AM 20 THE COURT: YOU WANT TO INTRODUCE PARTS OF A BRADY

08:44AM 21 LETTER AND LAY A FOUNDATION AND TALK TO THE JURY ABOUT BRADY V.

08:44AM 22 MARYLAND, AND WE WANT TO INTRODUCE THE LETTER?

08:44AM 23 MR. BRECHER: NOT THE DETAILS THAT YOUR HONOR JUST

08:44AM 24 SUGGESTED.

08:44AM 25 I THINK THE BEST ANALOGY, YOUR HONOR, IS WHAT ACTUALLY

08:45AM 1 HAPPENED IN COURT JUST THIS PAST WEEK. AND YOU'LL REMEMBER

08:45AM 2 THAT THROUGH MR. GROSSMAN, THERE WAS A DISPUTE BETWEEN

08:45AM 3 MS. WALSH AND MR. LEACH ABOUT THE AVAILABILITY OF -- EXCUSE ME,

08:45AM 4 THE ADMISSIBILITY OF CERTAIN INTERROGATORY RESPONSES THAT HAVE

08:45AM 5 BEEN FILED IN THE PFM CIVIL LITIGATION BY MR. BALWANI.

08:45AM 6 AND THE COURT HAD SOME OF THOSE SAME CONCERNS, AS DID WE.

08:45AM 7 DO WE NEED TO EXPLAIN TO THE JURY WHAT AN INTERROGATORY

08:45AM 8 RESPONSE IS? WHAT THIS SEPARATE LITIGATION IS? ARE THERE 403

08:45AM 9 CONCERNS?

08:45AM 10 AND WHERE YOUR HONOR CAME DOWN, BECAUSE THIS JUST HAPPENED

08:45AM 11 LAST WEEK AND PORTIONS OF THOSE RESPONSES CAME INTO EVIDENCE,

08:45AM 12 IS THAT WE COULD PRESENT OR THE GOVERNMENT COULD INTRODUCE

08:45AM 13 REDACTED TEXTS FROM THOSE RESPONSES.

08:45AM 14 AND THE FOUNDATION THAT WAS LAID THROUGH THE WITNESS WAS

08:45AM 15 SIMPLY THAT HE UNDERSTOOD THAT THESE WERE MR. BALWANI'S ANSWERS

08:45AM 16 TO QUESTIONS, WITHOUT GETTING INTO THE CONTEXT OF WHY THIS WAS

08:45AM 17 HAPPENING OR THE FACT THERE WAS CIVIL LITIGATION.

08:46AM 18 THE COURT: SURE.

08:46AM 19 MR. BRECHER: THIS, YOUR HONOR, I THINK IS A MUCH

08:46AM 20 EASIER QUESTION BECAUSE THIS DOESN'T RELATE TO SEPARATE

08:46AM 21 LITIGATION, IT RELATES TO THIS LITIGATION.

08:46AM 22 THE COURT: SO HOW WOULD YOU DO IT? HOW WOULD YOU

08:46AM 23 DO IT?

08:46AM 24 MR. BRECHER: SURE. WELL, YOUR HONOR, WE HAVE THE

08:46AM 25 BRADY LETTER, AND I THINK WE FILED IT TWO OR THREE TIMES IN

08:46AM 1 VARIOUS REDACTED FORMS. I THINK WHAT WE WOULD DO IS REDACT THE
08:46AM 2 TOP OF THE LETTER AND THE BULK OF THE TEXT.

08:46AM 3 WE WOULD ONLY MAKE CLEAR THAT THERE'S A SIGNATURE FROM THE
08:46AM 4 PROSECUTION TEAM TO SHOW THAT THIS IS A REPRESENTATION FROM THE
08:46AM 5 GOVERNMENT, AND WE WOULD DISPLAY CERTAIN PARAGRAPHS.

08:46AM 6 AND ALL WE WOULD DO IS EXACTLY WHAT WAS DONE WITH
08:46AM 7 MR. GROSSMAN AND THE PFM INTERROGATORIES, WHICH IS, DO YOU
08:46AM 8 UNDERSTAND THAT THESE ARE STATEMENTS MADE BY THE GOVERNMENT IN
08:46AM 9 THIS CASE?

08:46AM 10 THE COURT: AND THE STATEMENTS WOULD BE THE -- IT
08:46AM 11 SEEMS LIKE WHAT YOU'RE EAGER TO GET IN, IS THE STATEMENT BY AN
08:46AM 12 I.T. EMPLOYEE, PARALEGAL OR SOME SORT, WHO OPINED WHY DON'T YOU
08:46AM 13 DO THIS?

08:46AM 14 IS THAT IT? IS THAT IT?

08:46AM 15 MR. BRECHER: THAT IS ONE OF THE STATEMENTS,
08:47AM 16 YOUR HONOR.

08:47AM 17 I THINK MOST OF THE OTHERS WOULD RELATE TO PROVIDING THAT
08:47AM 18 CONTEXT, THAT, AGAIN, I THINK WE HAVE TO PROVIDE IN ORDER FOR
08:47AM 19 MR. SONNIER'S TESTIMONY TO MAKE SENSE, AND, FRANKLY, IN ORDER
08:47AM 20 TO BE FAIR TO THE GOVERNMENT, TO MAKE SURE THE JURY DOES KNOW
08:47AM 21 THERE WAS THIS COPY THAT NOBODY COULD ACCESS, AND THERE WAS
08:47AM 22 CONCERN ABOUT HOW DO WE GO ABOUT THAT.

08:47AM 23 THE COURT: SURE.

08:47AM 24 I'M SURE WE ALL WRESTLED WITH THIS, THIS WEEKEND, HOW DOES
08:47AM 25 THIS COME IN, IF IT COMES IN AT ALL? AND IN WHAT SCENARIO

08:47AM 1 WOULD IT COME IN?

08:47AM 2 AND HAVE YOU PUT TOGETHER SOMETHING THAT YOU COULD SHARE

08:47AM 3 WITH ME OTHER THAN OUR QUESTION BY QUESTION?

08:47AM 4 MR. BRECHER: WE HAVE NOT, YOUR HONOR. WE WOULD BE

08:47AM 5 MORE THAN HAPPY TO DO SO, AND I'M SURE WE COULD DO SO LATER

08:47AM 6 THIS AFTERNOON IF THE COURT WOULD LIKE.

08:47AM 7 THE COURT: BECAUSE WHEN I LOOK AT WHAT YOU WANT TO

08:47AM 8 DO, AND, YOU KNOW, WE READ THE CASES, AND I UNDERSTAND, YOU

08:47AM 9 KNOW, YOU DO NOT WANT THE COURT TO IN ANY WAY DISABUSE YOUR

08:47AM 10 ABILITY TO PUT ON A DEFENSE OR TO CRITICIZE THE GOVERNMENT'S

08:48AM 11 INVESTIGATION.

08:48AM 12 UNDERSTOOD. THAT'S CRIMINAL LAW 101, ISN'T IT?

08:48AM 13 MR. BRECHER: I'D LIKE TO THINK SO, YOUR HONOR.

08:48AM 14 THE COURT: RIGHT. THAT'S WHAT HAPPENS.

08:48AM 15 MR. BRECHER: BUT THERE ARE SOME PLEADINGS THAT HAVE

08:48AM 16 SUGGESTED OTHERWISE.

08:48AM 17 THE COURT: WELL, I WON'T ASK YOU WHICH SIDE.

08:48AM 18 SO IF HE TESTIFIES -- MY CONCERN WAS, HE CANNOT TESTIFY

08:48AM 19 ABOUT THE BRADY CONDUCT OR WHAT THE GOVERNMENT DID. HE CAN'T

08:48AM 20 TESTIFY, OH, THE GOVERNMENT SHOULD HAVE, WOULD HAVE, COULD

08:48AM 21 HAVE, AND BECAUSE THEY DIDN'T.

08:48AM 22 IT SEEMS LIKE HE IS THE EXPERT TO SAY, YOU CAN DO THIS, IF

08:48AM 23 YOU GET IT, YOU CAN ACTUALLY REBUILD IT, AND THAT'S HOW IT CAN

08:48AM 24 BE DONE.

08:48AM 25 AND THEN THE OTHER GAPS, I THINK, THE CONTEXT AS WELL, I'M

08:48AM 1 WONDERING ABOUT, HOW DOES THAT COME IN?

08:48AM 2 YOU KNOW, OVER THE WEEKEND, I THOUGHT, WELL, MAYBE THESE

08:48AM 3 PARTIES, BECAUSE THEY'VE BEEN GETTING ALONG SO WELL, THEY'LL

08:48AM 4 PROBABLY STIPULATE TO A CERTAIN FACT PATTERN THAT COMES IN,

08:48AM 5 MAYBE NOT.

08:48AM 6 BUT WHO WOULD YOU CALL? WOULD YOU INTEND TO CALL -- I

08:49AM 7 KNOW THERE WAS SOME LANGUAGE ABOUT WE'LL CALL MR. LEACH,

08:49AM 8 MR. BOSTIC, WE'LL CALL THE PARALEGAL, WE'LL CALL THE

08:49AM 9 UNITED STATES ATTORNEY IN.

08:49AM 10 MR. BRECHER: WELL, YOUR HONOR, I DON'T THINK THAT

08:49AM 11 ANY OF THAT IS NECESSARY.

08:49AM 12 FIRST, YOUR HONOR, IN ADDITION TO THE --

08:49AM 13 THE COURT: WELL, THAT'S A RELIEF.

08:49AM 14 MR. BRECHER: IN ADDITION TO THE BRADY LETTER,

08:49AM 15 YOUR HONOR, THERE MAY ALSO BE -- WE HAVE A PENDING DISCOVERY

08:49AM 16 MOTION, SO THERE MAY BE EMAILS THAT DISCUSS THESE VERY

08:49AM 17 RECOMMENDATIONS TO THE GOVERNMENT THAT WE HOPE YOUR HONOR WILL

08:49AM 18 ORDER THE GOVERNMENT TO PRODUCE TO US.

08:49AM 19 BUT I THINK THE ISSUE IS, THOSE EMAILS AND THAT BRADY

08:49AM 20 LETTER, THOSE ARE STATEMENTS AND CONDUCT BY DOJ EMPLOYEES

08:49AM 21 ACTING WITHIN THE SCOPE OF THEIR RESPONSIBILITY.

08:49AM 22 THE COURT: SO LET'S NOT TALK ABOUT ADMISSIBILITY.

08:49AM 23 I'M JUST CURIOUS HOW AND WHAT WOULD YOU DO? HOW DOES

08:49AM 24 THAT COME IN?

08:49AM 25 MR. BRECHER: WELL, YOUR HONOR, AS THE COURT KNOWS

08:49AM 1 FROM AN ARGUMENT THAT MY COLLEAGUE, MS. ESTRADA, HAD WITH

08:49AM 2 MR. SCHENK ABOUT TWO WEEKS AGO, AS LONG AS THE EVIDENCE ITSELF

08:49AM 3 IS ADMISSIBLE, YOU DON'T NEED A WITNESS WITH PERSONAL KNOWLEDGE

08:49AM 4 OF THE MATERIAL IN ORDER TO INTRODUCE IT.

08:49AM 5 WE SAW THAT WITH THE CHRISTIAN HOLMES EMAIL.

08:50AM 6 THE COURT: I'M SORRY. I'M NOT BEING CLEAR.

08:50AM 7 I'M ASKING YOU, HOW DOES IT COME IN? WHO IS IT? JUST,

08:50AM 8 HOW DOES THAT COME IN? DOES IT COME IN THROUGH SONNIER OR DO

08:50AM 9 YOU DO SOMETHING ELSE TO GET THIS IN?

08:50AM 10 MR. BRECHER: OH. I THINK, YOUR HONOR, WE WOULD

08:50AM 11 WANT TO KEEP THIS AS CLEAN AND AS SIMPLE AS POSSIBLE.

08:50AM 12 WE WOULD USE MR. SONNIER AND INTRODUCE THROUGH HIM

08:50AM 13 WHATEVER ADMISSIBLE MATERIALS YOUR HONOR ALLOWS US TO USE FROM

08:50AM 14 THE BRADY LETTER.

08:50AM 15 THE COURT: AND THAT QUESTION WOULD BE -- WHAT WOULD

08:50AM 16 THAT QUESTION BE TO HIM?

08:50AM 17 MR. BRECHER: I THINK IT WOULD BE EXACTLY THE SAME

08:50AM 18 QUESTION THAT THE GOVERNMENT WAS ALLOWED TO ASK OF MR. GROSSMAN

08:50AM 19 WITH RESPECT TO THE PFM INTERROGATORY RESPONSES.

08:50AM 20 THE COURT: SO HERE'S A STATEMENT FROM THE PARALEGAL

08:50AM 21 WHO SAID "WHY DON'T YOU TRY DOING THIS, WHY DON'T YOU TRY

08:50AM 22 PUTTING IT BACK TOGETHER?" AND YOU WOULD SHOW HIM THAT AND

08:50AM 23 SAY, "DO YOU AGREE WITH THAT?" AND HE'LL SAY, "YES, YES."

08:50AM 24 MR. BRECHER: THAT'S ESSENTIALLY IT, YOUR HONOR.

08:50AM 25 THE COURT: RIGHT.

08:50AM 1 AND THEN WILL HE SAY, "BUT THEY DIDN'T DO IT SO SHAME ON
08:50AM 2 THEM?" HE CAN'T SAY THAT.

08:50AM 3 MR. BRECHER: I DON'T THINK HE'S GOING TO SAY,
08:51AM 4 "SHAME ON THEM," YOUR HONOR.

08:51AM 5 I THINK IT'S ENOUGH FOR US TO SAY WE DON'T HAVE THIS
08:51AM 6 EVIDENCE, SO THEY CLEARLY DIDN'T DO IT.

08:51AM 7 THE COURT: YOU CAN SAY THAT NOW. DON'T YOU? YOU
08:51AM 8 HAVE SUFFICIENT EVIDENCE TO SAY THAT NOW.

08:51AM 9 MR. BRECHER: YES.

08:51AM 10 THE COURT: WHY DO YOU NEED THIS?

08:51AM 11 MR. BRECHER: WELL, YOUR HONOR, WE NEED IT FOR A
08:51AM 12 COUPLE OF REASONS.

08:51AM 13 FIRST -- AND WE SHOULD REMEMBER THE PROCEDURAL CONTEXT
08:51AM 14 HERE. IN THE LEAD UP TO THE HOLMES TRIAL, THERE WAS A SERIES
08:51AM 15 OF DEBATES ABOUT WHAT EVIDENCE ABOUT THE LIS COULD COME IN AND
08:51AM 16 LIS FAULT.

08:51AM 17 AND THE COURT ISSUED THREE RULINGS. THIS WAS DOCKET 798.

08:51AM 18 AND RULING NUMBER ONE WAS THAT UNLESS THE DEFENSE OPENED
08:51AM 19 THE DOOR, THE GOVERNMENT COULD NOT RAISE THE ISSUE OF
08:51AM 20 THERANOS'S FAULT IN THE LOSS OF THE LIS.

08:51AM 21 RULING NUMBER TWO WAS THAT MERELY MENTIONING THE ABSENCE
08:51AM 22 OF THE LIS DATA WOULD NOT OPEN THAT DOOR.

08:51AM 23 AND THEN RULING NUMBER THREE WAS IF THE DEFENSE, IN THIS
08:51AM 24 CASE THE HOLMES DEFENSE, WOULD HAVE BLAMED THE GOVERNMENT FOR
08:51AM 25 THE LOSS OF THE LIS, THEN IT WOULD OPEN THE DOOR TO SOMETHING,

08:51AM 1 AND THERE WOULD HAVE TO BE FURTHER LITIGATION TO FIGURE OUT
08:52AM 2 EXACTLY WHAT.

08:52AM 3 AS YOU'LL RECALL, YOUR HONOR, IN OUR OWN MIL'S, WE
08:52AM 4 REQUESTED THE COURT ADOPT THAT PRECISE RULING.

08:52AM 5 BUT THE GOVERNMENT SAID SOMETHING DIFFERENT. THE
08:52AM 6 GOVERNMENT SAID HOLD ON, STOP RIGHT THERE. WE'VE THOUGHT ABOUT
08:52AM 7 THINGS IN A DIFFERENT WAY.

08:52AM 8 AND, IN FACT, IF YOU TALK ABOUT THE ABSENCE OF THE LIS,
08:52AM 9 THAT IS IMPLICEDLY BLAMING THE GOVERNMENT FOR ITS LOSS BECAUSE
08:52AM 10 THE GOVERNMENT BEARS THE BURDEN OF PROOF.

08:52AM 11 WE OPPOSED THAT. AND YOUR HONOR SIDED WITH THE GOVERNMENT
08:52AM 12 ON THAT ISSUE.

08:52AM 13 THE COURT: I'M NOT SURE. I THINK THAT'S A BROAD
08:52AM 14 READING.

08:52AM 15 I NEVER, NEVER SAID THAT YOU WOULD BE PERMITTED TO
08:52AM 16 CRITICIZE THE ABSENCE OF THAT MATERIAL.

08:52AM 17 MR. BRECHER: OH, NO, YOUR HONOR, YOU DID NOT. AND
08:52AM 18 THAT'S ACTUALLY ONE OF THE THINGS WE'RE RELYING ON IN
08:52AM 19 PRESENTING THIS DEFENSE.

08:52AM 20 THE COURT: RIGHT.

08:52AM 21 MR. BRECHER: BUT I SHOULD HAVE BEEN CLEAR, WHAT THE
08:52AM 22 COURT CITED WITH THE GOVERNMENT ON IS IF THE DEFENSE TALKS
08:52AM 23 ABOUT THE ABSENCE OF THE LIS IN PARTICULAR, THAT IS IMPLICEDLY
08:52AM 24 FAULTING THE GOVERNMENT FOR ITS LOSS, AND IT ALLOWS -- IT OPENS
08:53AM 25 THE DOOR TO SOMETHING. WE STILL DON'T KNOW WHAT.

08:53AM 1 THE COURT: WELL, I THINK THAT'S A LITTLE BROAD.

08:53AM 2 IF -- I THINK THERE HAS TO BE MORE.

08:53AM 3 YOU'RE ABLE -- THE DEFENSE IS ALWAYS GOING TO BE ABLE TO

08:53AM 4 SAY, "THEY HAVEN'T PROVED THEIR CASE. AND HERE'S WHAT THEY

08:53AM 5 HAVE, THEY HAVE THREE PATIENTS. AND YOU HEARD THEM. THREE

08:53AM 6 PATIENTS. YOU HEARD EVIDENCE, LADIES AND GENTLEMEN, THAT THERE

08:53AM 7 WERE HOWEVER MANY TESTS."

08:53AM 8 ACTUALLY, I'M NOT SURE ANYBODY HAS TESTIFIED YET AS TO

08:53AM 9 WHETHER THERE WERE HUNDREDS AND THOUSANDS OR MILLIONS OF TESTS

08:53AM 10 THAT WOULD LIE ON THE LIS. MAYBE YOU HAVE RECOLLECTION OF

08:53AM 11 THAT. I KNOW THERE WAS SOME TESTIMONY ABOUT THAT IN THE HOLMES

08:53AM 12 CASE. THERE MAY BE SOME HERE, I JUST DON'T RECALL.

08:53AM 13 BUT TO THIS POINT, THE COURT HAD SAID IN ITS ORDER IN THIS

08:53AM 14 CASE -- AND I WAS NOT TRYING TO DISABUSE ANYONE OF PUTTING A

08:53AM 15 DEFENSE ON AT ALL. I WANT TO BE CLEAR ABOUT THAT.

08:53AM 16 MR. BRECHER: WE DIDN'T TAKE IT THAT WAY,

08:54AM 17 YOUR HONOR.

08:54AM 18 THE COURT: WHAT I WAS TRYING TO LET THE PARTIES

08:54AM 19 KNOW IS THAT IF EITHER PARTY, EITHER PARTY TRIES TO DO

08:54AM 20 SOMETHING WITH THE LIS, IT MAY VERY WELL OPEN THE DOOR BECAUSE

08:54AM 21 WE ALL KNOW THERE ARE SEVERAL DOORS AVAILABLE REGARDING THIS

08:54AM 22 LIS. THERE'S A LOT OF BACKGROUND INFORMATION THAT THE JURY

08:54AM 23 DOES NOT KNOW AT THIS POINT.

08:54AM 24 AND DEPENDING ON HOW THE ARGUMENTS GO AND WHAT THE

08:54AM 25 TESTIMONY IS, DOORS COULD BE OPENED.

08:54AM 1 NOT TO GET AHEAD OF MYSELF, BUT IF THE DEFENSE DECIDES TO
08:54AM 2 PUT THIS ON, THE GOVERNMENT MAY WANT TO -- WELL, MS. VOLKAR
08:54AM 3 SAID THAT IN HER PLEADINGS, DIDN'T SHE?

08:54AM 4 MR. BRECHER: YES, YOUR HONOR.

08:54AM 5 THE COURT: WE'LL PUT ALL OF THE OTHER EVIDENCE IN,
08:54AM 6 AND THE COURT MIGHT SAY, AS YOU RECOGNIZE, FAIRNESS TO THE
08:54AM 7 GOVERNMENT, THERE MIGHT BE SOME OR ALL OF THAT, THAT WOULD AT
08:54AM 8 LEAST BE CONSIDERED FOR ADMISSIBILITY, TO GIVE THE JURY THE
08:54AM 9 ENTIRE STORY, AS YOU SAID.

08:54AM 10 MR. BRECHER: YES, YOUR HONOR. I'M HAPPY TO ADDRESS
08:54AM 11 AND PLAN TO ADDRESS TODAY PRECISELY WHERE WE THINK THAT THOSE
08:54AM 12 LINES SHOULD BE DRAWN.

08:54AM 13 BUT I WANT TO MAKE SURE THAT I STICK WITH ANSWERING THE
08:55AM 14 COURT'S QUESTIONS FOR NOW JUST TO MAKE IT CLEAR HOW WE INTEND
08:55AM 15 TO DO THIS.

08:55AM 16 I THINK IT'S NOT A PARTICULARLY COMPLICATED EXERCISE.
08:55AM 17 IT'S ONE THAT REALLY TRACKS WELL, WHAT THE COURT ALLOWED
08:55AM 18 MR. LEACH TO DO WITH MR. GROSSMAN THE OTHER DAY.

08:55AM 19 "MR. SONNIER, DO YOU UNDERSTAND THAT THESE ARE
08:55AM 20 REPRESENTATIONS BY THE GOVERNMENT?" FULL STOP. THAT'S IT.

08:55AM 21 HERE'S A PIECE TALKING ABOUT THIS ENCRYPTED COPYING OF A
08:55AM 22 DATABASE. HERE'S A PARAGRAPH SAYING IT COULDN'T BE OPENED.
08:55AM 23 HERE'S A RECOMMENDATION FROM THE GOVERNMENT'S TECHNICAL
08:55AM 24 SUPERVISOR SAYING WHY DON'T YOU TRY THIS. AND THEN THE
08:55AM 25 FOLLOWUP.

08:55AM 1 MR. SONNIER, DO YOU AGREE WITH THAT? WOULD THAT HAVE

08:55AM 2 WORKED?

08:55AM 3 YES.

08:55AM 4 I DON'T THINK IT GETS SIGNIFICANTLY MORE COMPLICATED THAN

08:55AM 5 THAT.

08:55AM 6 THE COURT: THAT'S ABOUT A TEN MINUTE TESTIMONY

08:55AM 7 THEN.

08:55AM 8 MR. BRECHER: WELL, YOUR HONOR, I THINK IT MAY BE A

08:55AM 9 LITTLE LONGER IF ONLY TO ESTABLISH HIS BONE FIDES AS AN EXPERT.

08:55AM 10 AND I IMAGINE THAT THAT FOUNDATION WOULD TAKE SLIGHTLY LONGER

08:55AM 11 THAN I'VE JUST ARTICULATED IT. BUT THE ESSENCE OF IT IS JUST

08:55AM 12 THAT.

08:55AM 13 THE COURT: SO HE WOULD NOT SAY, WELL, BECAUSE THEY

08:56AM 14 DID X, THEY SAT ON IT, THEY DIDN'T DO THAT, THAT WAS

08:56AM 15 MALFEASANCE, AND THEY SHOULD HAVE KNOWN BETTER OR THEY SHOULD

08:56AM 16 HAVE GOT ON IT SOONER, OR THEY SHOULD HAVE REALIZED THIS, HE'S

08:56AM 17 NOT GOING TO TESTIFY ABOUT THAT, CRITICIZING THE GOVERNMENT IN

08:56AM 18 THEIR ACTIONS?

08:56AM 19 MR. BRECHER: WELL, NO AND POSSIBLY YES.

08:56AM 20 AGAIN, I WANT TO BE CLEAR AT EVERY STAGE WHAT WE'RE

08:56AM 21 TALKING ABOUT.

08:56AM 22 THE COURT: SURE.

08:56AM 23 MR. BRECHER: SO THE POINT RAISED BY MS. VOLKAR IN

08:56AM 24 THE GOVERNMENT'S REPLY BRIEF, RIGHT, THAT MR. SONNIER MAY

08:56AM 25 OFFER, A FEAR THAT MR. SONNIER WOULD OFFER LEGAL CONCLUSIONS

08:56AM 1 ABOUT NEGLIGENCE OR RECKLESSNESS, WE'RE NOT GOING TO ASK HIM
08:56AM 2 THAT. THAT'S AN ISSUE FOR THE JURY.

08:56AM 3 AND IF WE'RE ALLOWED TO RAISE THIS SORT OF ADVERSE
08:56AM 4 INFERENCE INSTRUCTION, WHICH WE PLAN TO PRESS AT THE CHARGING
08:56AM 5 CONFERENCE, AND YOUR HONOR HAS DEFERRED RULING ON THAT ISSUE,
08:56AM 6 THEN WE WOULD ARGUE FROM THE INFERENCES.

08:56AM 7 THAT'S NOT SOMETHING FOR MR. SONNIER TO TESTIFY ABOUT.

08:56AM 8 WHAT HE MIGHT SAY THAT COMES CLOSE TO CRITICISM, I GUESS,
08:56AM 9 IS, YES, I AGREE, AND THE GOVERNMENT COULD HAVE DONE THAT. AND
08:57AM 10 STOP THERE.

08:57AM 11 THE COURT: HOW DOES HE KNOW THAT?

08:57AM 12 MR. BRECHER: YOUR HONOR, FIRST OF ALL, THIS IS A
08:57AM 13 FOUNDATIONAL ISSUE FOR MR. SONNIER'S BACKGROUND. BUT AS WE
08:57AM 14 WILL ESTABLISH -- AND HIS CV IS ALREADY ATTACHED AS EXHIBIT A
08:57AM 15 TO DOCKET 1158 REFLECTS -- I'M SORRY, MS. RODRIGUEZ.

08:57AM 16 MR. SONNIER IS A VETERAN OF COUNTLESS FORENSIC
08:57AM 17 INVESTIGATIONS. THIS IS WHAT HE DOES FOR A LIVING. HE'S GOING
08:57AM 18 TO SAY, "I'M FAMILIAR WITH HOW WE SEIZE EVIDENCE, AND I HAVE
08:57AM 19 ALSO REVIEWED MATERIAL."

08:57AM 20 AND YOUR HONOR WILL RECALL, EXPERTS CAN FORM OPINIONS
08:57AM 21 BASED ON EVEN INADMISSIBLE MATERIALS THEY REVIEW IF IT'S
08:57AM 22 RELIABLE WITHIN THEIR FIELD.

08:57AM 23 AND HE'S GOING TO SAY, I'VE LOOKED AT LITERATURE THAT I
08:57AM 24 CONSIDER RELIABLE IN MY FIELD AND THAT OTHER EXPERTS RELY ON
08:57AM 25 ABOUT BEST PRACTICES AND WHAT SHOULD BE DONE IN SEIZING

08:57AM 1 ELECTRONIC DATA, AND I THINK THE GOVERNMENT COULD HAVE DONE
08:57AM 2 THIS. AND I DON'T SEE HOW THAT'S CONTROVERSIAL, YOUR HONOR.
08:57AM 3 THE COURT: I THINK IT MIGHT BE. I THINK IT MIGHT
08:57AM 4 BE.
08:57AM 5 IF HE STARTS TO TESTIFY ABOUT -- I THINK YOU WANT TO
08:58AM 6 INTRODUCE SOMETHING, AND WE'LL TALK ABOUT YOUR EXHIBITS,
08:58AM 7 THERE'S A LIST OF EXHIBITS AND ONE OF THEM IS A SECRET
08:58AM 8 SERVICE MANUAL.
08:58AM 9 MR. BRECHER: WE DON'T INTEND TO INTRODUCE THAT,
08:58AM 10 YOUR HONOR.
08:58AM 11 THE COURT: RIGHT.
08:58AM 12 MR. BRECHER: I'M HAPPY TO ADDRESS THOSE NOW SINCE
08:58AM 13 THE COURT RAISED THEM.
08:58AM 14 THE COURT: WELL, I RAISED THEM BECAUSE I LOOKED AT
08:58AM 15 THEM AND I THOUGHT, OH, DEAR, WHERE ARE WE GOING?
08:58AM 16 MR. BRECHER: YOUR HONOR, WHERE WE'RE GOING IS VERY
08:58AM 17 SIMPLE. IT'S A MATTER OF COURTESY TO THE GOVERNMENT AND TO ALL
08:58AM 18 PARTIES TO MARK EVERYTHING THAT AN EXPERT RELIED ON AS AN
08:58AM 19 EXHIBIT.
08:58AM 20 AND AS YOU KNOW, WE CAN REFRESH ANY WITNESS'S
08:58AM 21 RECOLLECTION, BUT CERTAINLY AN EXPERT'S RECOLLECTION WITH
08:58AM 22 VIRTUALLY ANYTHING.
08:58AM 23 THE PURPOSE OF DOCUMENTS LIKE THOSE, ARE NOT TO INTRODUCE
08:58AM 24 THEM INTO EVIDENCE. IT'S SO IF WE ASK MR. SONNIER A QUESTION,
08:58AM 25 AND HE STUMBLES A BIT, WHOEVER IS CONDUCTING THAT EXAMINATION

08:58AM 1 COULD SAY SOMETHING LIKE, MR. SONNIER, COULD YOU FLIP TO
08:58AM 2 EXHIBIT 20560 IN YOUR BINDER, TAKE A LOOK AT IT. DOES THAT
08:58AM 3 REFRESH YOUR RECOLLECTION? DOES THAT HELP YOU ARTICULATE THE
08:58AM 4 OPINIONS THAT YOU'VE FORMED?
08:58AM 5 THAT'S ALWAYS PERMISSIBLE UNDER THE RULES OF EVIDENCE.
08:59AM 6 SO, NO, THAT'S NOT WHAT OUR EXHIBIT LIST REFLECTS AND
08:59AM 7 NOTHING THAT WE HAVE SAID IN OUR PLEADINGS SUGGEST OTHERWISE.
08:59AM 8 THE COURT: SO I WONDER IF, I WONDER IF IT WOULD BE
08:59AM 9 HELPFUL, AND IF YOU'RE WILLING TO OR WANT TO -- AND AGAIN, I'M
08:59AM 10 NOT GOING TO ORDER YOU TO DO THIS, BUT IT MIGHT BE HELPFUL TO
08:59AM 11 THE PARTIES IF YOU WERE TO PUT TOGETHER A -- I'M NOT ASKING YOU
08:59AM 12 TO GIVE US WHAT YOUR TESTIMONY OR QUESTIONS ARE GOING TO BE,
08:59AM 13 BUT IT MIGHT BE HELPFUL TO SEE AN OUTLINE OF WHAT WE'RE TALKING
08:59AM 14 ABOUT HERE, HOW THAT'S GOING TO WORK CONTEXTUALLY?
08:59AM 15 AND IF YOU PREFER NOT TO DO THAT, THAT'S FINE, WE'LL
08:59AM 16 CONTINUE TO TALKING ABOUT THIS. BUT THAT MIGHT BE HELPFUL.
08:59AM 17 MR. BRECHER: I APPRECIATE IT, YOUR HONOR.
08:59AM 18 I THINK ON THAT, BECAUSE OF THE VERY I THINK SOMEWHAT
08:59AM 19 SERIOUS WORK PRODUCT CONCERNS, I WOULD LIKE TO AT LEAST CONSULT
08:59AM 20 WITH MY TEAM AND MY CLIENT BEFORE I MAKE THAT SORT OF
08:59AM 21 COMMITMENT.
08:59AM 22 BUT WE CAN TALK ABOUT THAT AT THE BREAK. AND I AM HAPPY
08:59AM 23 TO ANSWER ANY OF THE COURT'S QUESTIONS.
08:59AM 24 (DISCUSSION AMONGST DEFENSE COUNSEL OFF THE RECORD.)
09:00AM 25 MR. BRECHER: I'M TOLD THAT'S IT'S FINE. WE WOULD

09:00AM 1 BE HAPPY TO DO THAT, YOUR HONOR.

09:00AM 2 THE COURT: OKAY. WELL, THAT WOULD BE HELPFUL, I

09:00AM 3 THINK, TO THE DISCUSSION. I'VE LOOKED AT THIS, AND I'M TRYING

09:00AM 4 TO FATHOM, BEFORE I MAKE A DECISION, I SHOULD PROBABLY KNOW

09:00AM 5 WHERE IS THIS GOING TO GO AND HOW IS IT GOING TO COME IN?

09:00AM 6 I WOULD RATHER DO THAT, IF WE CAN, OUTSIDE OF THE PRESENCE

09:00AM 7 OF THE JURY, IN ADVANCE. AND AGAIN, I'M NOT ASKING YOU TO GIVE

09:00AM 8 ME YOUR SCRIPT OF QUESTIONS, BUT JUST AN IDEA OF WHAT IS THE

09:00AM 9 FOUNDATION, HOW IS THIS GOING TO BE, SO WE CAN LOOK AT IT AND

09:00AM 10 MAYBE HAVE SOME CONVERSATION TO HELP BOTH SIDES ON THAT.

09:00AM 11 MR. BRECHER: I UNDERSTAND, YOUR HONOR.

09:00AM 12 WELL, MR. COOPERSMITH TOLD ME IT'S FINE, SO I'M GOING TO

09:00AM 13 TAKE HIM AT HIS WORD ON THAT.

09:00AM 14 THE COURT: OKAY.

09:00AM 15 MR. BRECHER: BUT WE APPRECIATE THAT, YOUR HONOR.

09:00AM 16 ACTUALLY, YOUR HONOR, I WAS GOING TO SPEAK TO THE ISSUES

09:00AM 17 THAT THE GOVERNMENT RAISED, BUT IT'S THEIR MOTION.

09:00AM 18 THE COURT: RIGHT. AND I STARTED WITH YOU BECAUSE I

09:00AM 19 WANTED TO KNOW WHAT IS IT YOU WANT FROM MR. SONNIER? HOW DO

09:00AM 20 YOU INTEND TO GET IT IN?

09:01AM 21 I'M RELIEVED TO HEAR THAT YOU'RE NOT GOING TO CALL AND YOU

09:01AM 22 DON'T INTEND TO CALL ANY OF THE PROSECUTING ATTORNEYS HERE TO

09:01AM 23 TESTIFY ABOUT THEIR CONDUCT OR ANYTHING THEY DID IN RELATION TO

09:01AM 24 THIS ISSUE.

09:01AM 25 MR. BRECHER: NO, YOUR HONOR. I THINK EVERYTHING

09:01AM 1 THAT WE NEED WOULD BE REFLECTED EITHER IN THE EMAILS THAT WE'VE
09:01AM 2 REQUESTED, WHICH WOULD BE AUTHENTIC. AND THERE IS CASE LAW SUIT
09:01AM 3 THAT WE HAVE ALREADY CITED THAT AUTHENTICITY IS USUALLY
09:01AM 4 ESTABLISHED SIMPLY BY BEING INTRODUCED BY THE OTHER PARTY, AND
09:01AM 5 THEY WOULD REFLECT CONDUCT TAKEN BY DOJ EMPLOYEES WITHIN THE
09:01AM 6 SCOPE OF THEIR RESPONSIBILITIES. SO THAT WOULD BE 801(D)
09:01AM 7 ADMISSIONS.

09:01AM 8 BUT AS I SAID, YOUR HONOR, WE ALREADY HAVE THE BRADY
09:01AM 9 LETTER, WHICH IS AN 801(D) ADMISSION. AND WE'RE HAPPY TO
09:01AM 10 SUBMIT A SUPPLEMENTAL BRIEF ON THAT POINT, BUT THAT ONE IS NOT
09:01AM 11 A CLOSE QUESTION.

09:01AM 12 THE COURT: OKAY. THANK YOU.

09:01AM 13 MS. VOLKAR, GOOD MORNING.

09:01AM 14 MS. VOLKAR: GOOD MORNING, YOUR HONOR.

09:01AM 15 THE COURT: SO YOU HEAR ME TALKING ABOUT
09:01AM 16 MR. SONNIER'S TESTIMONY AND FOUNDATION AND WHAT WOULD HE
09:02AM 17 TESTIFY ABOUT, HOW WOULD THAT COME IN. THAT'S KIND OF WHAT I'M
09:02AM 18 INTERESTED IN.

09:02AM 19 I'M NOT SUGGESTING THAT I'M GOING TO ALLOW IT TO COME IN,
09:02AM 20 BUT THAT'S KIND OF THE ISSUE THAT IS BEFORE ME NOW AS I LOOK AT
09:02AM 21 THAT.

09:02AM 22 MS. VOLKAR: AND, YOUR HONOR, WE HAVE A DECLARATION
09:02AM 23 FROM MR. SONNIER AT ECF NUMBER 1158. I BELIEVE MY COLLEAGUE
09:02AM 24 CONFIRMED TODAY THAT THAT'S WHAT THEY INTEND HIM TO TESTIFY TO
09:02AM 25 AND ABOUT.

09:02AM 1 WE, OF COURSE, HAVE MANY CONCERNS, EVEN JUST READING

09:02AM 2 THROUGH THAT DECLARATION. WHAT THE PURPOSE OF OUR MOTION IS,

09:02AM 3 IS REGARDLESS OF THE TRUTH OR FALSITY OF WHAT IS IN THAT

09:02AM 4 DECLARATION, WHICH, OF COURSE, IS ITS OWN BATTLE AND BOTH SIDES

09:02AM 5 HAVE A LOT OF DISAGREEMENTS ABOUT THAT, IT'S JUST NOT RELEVANT.

09:02AM 6 THE COURT CAN TAKE EVERYTHING IN THAT DECLARATION TO BE

09:02AM 7 TRUE, AND IT HAS NO TENDENCY TO MAKE MORE OR LESS PROBABLE ANY

09:02AM 8 FACT OF CONSEQUENCE IN THIS TRIAL IN THE CHARGES AGAINST

09:02AM 9 MR. BALWANI, THE WIRE FRAUD AND CONSPIRACY TO COMMIT WIRE FRAUD

09:03AM 10 CHARGES.

09:03AM 11 AND SO I WOULD GO SO FAR AS TO SAY, EVEN IF THE DEFENSE

09:03AM 12 WERE TO PUT TOGETHER A FURTHER OUTLINE OF HOW THEY EXPECT THIS

09:03AM 13 TO COME IN, IT SIMPLY IS IRRELEVANT. THEY DON'T GET OVER THE

09:03AM 14 THRESHOLD FEDERAL RULE OF EVIDENCE 104 BAR, WHICH IS THE COURT

09:03AM 15 GETS TO DECIDE WHETHER OR NOT THIS EVIDENCE IS GOING TO BE

09:03AM 16 ADMISSIBLE, AND HERE IT'S NOT BECAUSE IT'S SIMPLY IRRELEVANT.

09:03AM 17 AND, OF COURSE, THERE ARE 403 CONCERNS AS WELL.

09:03AM 18 AS I LAID OUT IN THE PLEADING, THERE IS SOME 702, BUT A

09:03AM 19 LOT OF THAT TIES TOGETHER WITH THE RELEVANCE.

09:03AM 20 WHAT MY COLLEAGUE JUST MOST RECENTLY SAID IS ACTUALLY MORE

09:03AM 21 CONCERNING TO ME BECAUSE NOW WE'RE GETTING INTO EVEN MORE

09:03AM 22 ISSUES. MR. SONNIER WAS DISCLOSED TO THE GOVERNMENT AS AN

09:03AM 23 EXPERT IN MICROSOFT AS TO SQL DATABASES.

09:03AM 24 HOWEVER, MY COLLEAGUE JUST SAID HE'S A VETERAN OF FORENSIC

09:03AM 25 EVALUATIONS, AND HE SHOULD BE PERMITTED TO TESTIFY AS AN EXPERT

09:03AM 1 ABOUT BEST PRACTICES, AND WE SHOULD BE PERMITTED TO REFRESH HIS
09:04AM 2 RECOLLECTION ON THE STAND USING A SECRET SERVICES BEST
09:04AM 3 PRACTICES AND ELECTRONIC DATABASE COLLECTION AND FORENSICS.
09:04AM 4 THAT IS SO FAR FROM WHAT THEY DISCLOSED HIM AS AN EXPERT
09:04AM 5 AT THE OUTSET, THAT WE'RE REALLY DOWN THE ROAD QUITE A BIT, AND
09:04AM 6 NOW WE HAVE DISCOVERY AND DISCLOSURE CONCERNS AS WELL.
09:04AM 7 BUT LET'S STICK TO WHAT'S IN HIS ACTUAL DECLARATION AND
09:04AM 8 WHY THAT IS IRRELEVANT TO THIS CASE.
09:04AM 9 AS YOUR HONOR KNOWS, WHAT IS ALREADY IN EVIDENCE IS THE
09:04AM 10 FACT THAT THERE WAS AN LIS DATABASE, THAT IT CONTAINED SOME
09:04AM 11 DATA. IT DID NOT CONTAIN WHETHER OR NOT THE PATIENT RESULTS,
09:04AM 12 THE INDIVIDUAL PATIENT RESULTS WERE ACCURATE OR INACCURATE.
09:04AM 13 AND THEN, AS YOUR HONOR KNOWS BUT THE JURY DOES NOT, AT
09:04AM 14 SOME LATER POINT IN TIME, AFTER MULTIPLE SUBPOENAS, THE
09:04AM 15 GOVERNMENT ATTEMPTED TO GET A COPY OF THIS DATABASE BUT WAS
09:04AM 16 PROVIDED A NONFUNCTIONING COPY FROM THERANOS.
09:04AM 17 THE RECONSTRUCTION OR ABILITY TO RECONSTRUCT IT AFTER THAT
09:05AM 18 AUGUST 31ST, 2018 TIME PERIOD IS IRRELEVANT FOR THE REASONS
09:05AM 19 THAT YOUR HONOR HAS FOUND THREE TIMES BEFORE.
09:05AM 20 AND THE FIRST AND MOST IMPORTANT ONE IS AT THAT TIME IN
09:05AM 21 AUGUST OF 2018, THE GOVERNMENT HAD NO IDEA THAT THE LIS
09:05AM 22 DATABASE WAS, ONE, NOT PROVIDED IN THE FUNCTIONING VERSION,
09:05AM 23 AND, TWO, ABOUT TO BE DISMANTLED, AND AGAIN, FROM OUR
09:05AM 24 PERSPECTIVE, IMPOSSIBLE TO PUT BACK TOGETHER.
09:05AM 25 WHO DID KNOW WAS MR. BALWANI'S CONSULTANT WHO WAS ON THE

09:05AM 1 PHONE AND APPARENTLY WAS RETAINED TO TRY TO OBTAIN A COPY OF

09:05AM 2 THIS LIS.

09:05AM 3 BUT AS MY COLLEAGUES HAVE JUST SAID, MR. BRECHER JUST

09:05AM 4 SAID, THE DEFENSE DOESN'T HAVE A COPY OF THIS EITHER. SO EVEN

09:05AM 5 IN THEIR FACTUAL WORLD THEY THOUGHT THIS WOULD BE USEFUL AND

09:05AM 6 WANTED TO GET A COPY OF IT AND WERE UNABLE TO DO SO.

09:05AM 7 BUT NOW, YEARS LATER, THEY'VE HIRED AN EXPERT, WHO, AGAIN,

09:06AM 8 THEORETICALLY, THEY COULD HAVE HIRED AT THE TIME. AND HE SAYS,

09:06AM 9 THEORETICALLY, IT COULD HAVE BEEN PUT BACK TOGETHER, AND THE

09:06AM 10 GOVERNMENT SHOULD HAVE DONE X, Y, Z STEPS TO DO SO.

09:06AM 11 IF THE EXPERT WAS SIMPLY GOING TO TESTIFY IN A THEORETICAL

09:06AM 12 WORLD, ONE COULD PUT BACK TOGETHER THIS DATABASE, THAT MIGHT BE

09:06AM 13 ONE THING. BUT THAT'S NOT WHAT THEY WANT HIM TO TESTIFY ABOUT.

09:06AM 14 THEY WANT, MR. BALWANI WANTS TO BE ABLE TO PUT THE

09:06AM 15 GOVERNMENT ON TRIAL. BUT THE GOVERNMENT IS NOT ON TRIAL HERE.

09:06AM 16 OF COURSE, THE GOVERNMENT MUST MEET ITS BURDEN OF PROOF,

09:06AM 17 BUT TO CHANGE INTO THE LANE THAT MY COLLEAGUES WANT TO CHANGE

09:06AM 18 INTO, WHICH IS TO SAY THAT THE GOVERNMENT ACTED RECKLESSLY,

09:06AM 19 NEGLIGENTLY, THAT THE GOVERNMENT -- THAT WE WANT TO PUT A

09:06AM 20 LETTER BEFORE A WITNESS ON THE STAND AND SHOW THE PROSECUTOR'S

09:06AM 21 SIGNATURE, WE WANT TO BE ABLE TO POINT THE FINGER ACROSS THE

09:06AM 22 TABLE AND SAY, "LOOK AT HOW BAD THEY ARE, TOO," THAT'S NOT

09:06AM 23 PERMISSIBLE AND NOT RELEVANT.

09:06AM 24 AND I WANT TO BE VERY CLEAR, ABSOLUTELY CRIMINAL

09:06AM 25 DEFENDANTS CAN SAY THE GOVERNMENT HASN'T MET THEIR BURDEN OF

09:07AM 1 PROOF. WE FULLY ENDORSE THE OBLIGATIONS THAT WE HAVE TO MEET.

09:07AM 2 BUT THERE'S A DIFFERENCE BETWEEN THAT AND TRYING TO VEER

09:07AM 3 INTO "THE GOVERNMENT ACTED IN BAD FAITH." AND THE DEFENSE

09:07AM 4 RIGHT NOW IS TRYING TO VEER INTO "THE GOVERNMENT ACTED IN BAD

09:07AM 5 FAITH, THE PROSECUTION ACTED IN BAD FAITH, THE PROSECUTION

09:07AM 6 ACTED NEGLIGENTLY, THE PROSECUTION ACTED RECKLESSLY," AND FOR

09:07AM 7 TWO REASONS. ONE, IT HAS SIMPLY NOTHING TO DO WITH THE CHARGES

09:07AM 8 AT TRIAL. IT'S A COMPLETE DISTRACTION. IT'S A TOTAL SIDESHOW.

09:07AM 9 THAT'S WHERE A MINI TRIAL AND RULE 403 COMES IN.

09:07AM 10 BUT ON TOP OF THAT, YOUR HONOR HAS ALREADY DETERMINED

09:07AM 11 UNDER A LEGAL STANDARD OF REVIEW THAT THE GOVERNMENT DIDN'T ACT

09:07AM 12 IN BAD FAITH, THAT THE GOVERNMENT WAS AT WORST NEGLIGENT.

09:07AM 13 SO YOUR HONOR HAS ALREADY MADE THE LEGAL DETERMINATION

09:07AM 14 THAT MR. BRECHER WANTS TO RELITIGATE. AND NOW, WHAT THEY WANT

09:07AM 15 TO DO INSTEAD, IS TO RELITIGATE THOSE ISSUES BEFORE THE

09:07AM 16 GOVERNMENT WITHOUT ALL OF THE CONTEXT.

09:07AM 17 AND WHEN HE SAYS THAT WE WANT TO MAKE SURE WE'VE TALKED

09:07AM 18 ABOUT WHAT DOORS ARE CLOSED AND HOW WE CAN LIMIT IT, THEY WANT

09:07AM 19 TO SHOW ONE ANGLE OF THIS DISPUTE TO THE JURY. THEY WANT TO

09:08AM 20 SHOW JUST THE FACT THAT THEY THINK MAKE THE GOVERNMENT LOOK

09:08AM 21 POORLY, AND THEN THEY WANT TO BLOCK THE GOVERNMENT FROM BEING

09:08AM 22 ABLE TO GIVE THE FULL STORY THAT SHOWS THAT MR. BALWANI HAD

09:08AM 23 EQUAL OR GREATER ACCESS TO THIS MATERIAL AND SAT ON HIS HANDS.

09:08AM 24 AND ALSO, THAT THERANOS, THE COMPANY THAT HE ONCE UPON A

09:08AM 25 TIME WORKED FOR, IS THE CULPRIT FOR DESTROYING IT AND THE

09:08AM 1 REASON WHY IT'S NOT HERE.

09:08AM 2 AND AGAIN, I GO BACK TO THE FIRST OF THE SUBPOENAS WERE

09:08AM 3 ISSUED TO THERANOS WHEN HE WAS STILL THE CHIEF OPERATING

09:08AM 4 OFFICER, AND THAT'S GOING TO COME OUT IF WE GET INTO THIS LAND.

09:08AM 5 THE COURT: WELL, THAT'S WHAT I WAS CONCERNED ABOUT

09:08AM 6 ALSO IS HOW DOES THIS COME IN FROM THE DEFENSE SIDE? AND THEN

09:08AM 7 WHAT WOULD THE RESPONSE BE AS FAR AS REBUTTAL OR WHATEVER?

09:08AM 8 AND IT SEEMS LIKE THERE'S A LOT OF INFORMATION,

09:08AM 9 POTENTIALLY, OUT HERE. AND, AGAIN, I WANT TO AVOID MINI

09:09AM 10 TRIALS, BECAUSE THAT'S WHAT THIS LOOKS LIKE, IT WOULD BOIL DOWN

09:09AM 11 TO. MY SENSE IS THERE WOULD BE MULTIPLE WITNESSES THAT WOULD

09:09AM 12 BE CALLED BY BOTH SIDES ON THIS ISSUE.

09:09AM 13 MS. VOLKAR: AND IF I MAY BE HEARD ON THAT,

09:09AM 14 YOUR HONOR?

09:09AM 15 MY UNDERSTANDING IS THAT THE DEFENSE WANTS TO GET AROUND

09:09AM 16 THAT BY CALLING JUST MR. SONNIER AND HAVING ALL OF THESE FACTS

09:09AM 17 THAT THEY WANT PUT IN THROUGH THEM.

09:09AM 18 AND I GO BACK TO YOUR HONOR'S FIRST QUESTION, THAT'S NOT

09:09AM 19 THE PROPER FOUNDATION. THEY WANT TO USE THE BRADY LETTER AS A

09:09AM 20 FACTUAL BASIS TO GET SOME OF THIS INFORMATION BEFORE THE JURY.

09:09AM 21 I DON'T THINK I'VE EVER HEARD OF THAT BEFORE. AND MAYBE I

09:09AM 22 JUST HAVEN'T BEEN AROUND THE BLOCK LONG ENOUGH. MAYBE

09:09AM 23 YOUR HONOR HAS SEEN THAT, BUT THAT'S A NEW ONE TO ME.

09:09AM 24 AND THEY WANT TO GET IN FACTS, AS THEY CALL IT, THROUGH AN

09:09AM 25 EXPERT WITNESS, WHO IS AN EXPERT ON SQL DATABASES, NOT AS

09:09AM 1 THEY'VE NOTICED HIM, A FACT ON FORENSIC EVALUATION, NOT AN
09:09AM 2 EXPERT ON HOW THE GOVERNMENT COULD HAVE HANDLED THIS
09:09AM 3 INVESTIGATION, AND NOT AN EXPERT ON THE THOROUGHNESS OF AN
09:09AM 4 INVESTIGATION. THAT SIMPLY IS NOT THE EXPERT THAT THEY HAVE
09:10AM 5 NOTICED.

09:10AM 6 THEY HAVE NOTICED SOMEONE WHO IS A, QUOTE-UNQUOTE,
09:10AM 7 "EXPERT," AND WE WEREN'T CHALLENGING THAT, IN ITS SQL
09:10AM 8 DATABASES. THAT'S WHAT WE'RE NOT CHALLENGING.

09:10AM 9 ANYTHING BEYOND THAT, WE GET INTO TREACHEROUS TERRITORY.
09:10AM 10 AND I JUST DON'T SEE HOW THEY ARE GOING TO PUT ON THIS CASE
09:10AM 11 WITHOUT CALLING DOZENS OF MORE WITNESSES THAT THEY HAVEN'T
09:10AM 12 DISCLOSED TO US.

09:10AM 13 AND I THINK IT'S REALLY TELLING THAT THEY DISCLOSED HIM AS
09:10AM 14 ONE OF THEIR INITIAL WITNESSES AND SOME BACKGROUND THAT IS NOT
09:10AM 15 OTHERWISE BEFORE THE COURT.

09:10AM 16 WE RECEIVED ON THE THURSDAY NIGHT DISCLOSURE, ABOUT TWO
09:10AM 17 HOURS AFTER THE DEADLINE, A DISCLOSURE OF FOUR WITNESSES WITH
09:10AM 18 MR. SONNIER ON THE LIST.

09:10AM 19 MONDAY MORNING AROUND I BELIEVE IT WAS 11:00 A.M., WE GOT
09:10AM 20 A RENEWED DISCLOSURE WITH THREE TOTALLY DIFFERENT WITNESSES --
09:10AM 21 I'M SORRY, THREE TOTALLY DIFFERENT WITNESSES WITH ONE
09:10AM 22 EXCEPTION, MR. SONNIER.

09:10AM 23 MR. SONNIER IS THE ONLY WITNESS THAT WAS DISCLOSED ON THE
09:10AM 24 TWO DIFFERENT, BOTH LATE, BUT TWO DIFFERENT DISCLOSURES THAT WE
09:10AM 25 RECEIVED OF WITNESSES, WHICH IS HOW WE KNEW THAT THIS ISSUE WAS

09:10AM 1 COMING TO A HEAD VERY SOON. WE ACTED AS QUICKLY AS WE COULD TO
09:11AM 2 FILE THIS MOTION.

09:11AM 3 WE DON'T SEE WHAT WITNESSES THEY PLAN TO PUT ON BEFOREHAND
09:11AM 4 TO BRING IN ANY OF THESE FACTS, AND THE EXHIBIT LIST GIVES US
09:11AM 5 FURTHER CAUSE FOR CONCERN. THERE'S ALL OF THE MOTION PRACTICE
09:11AM 6 BETWEEN THE PARTIES, YOUR HONOR'S ORDER ON THE MOTION TO
09:11AM 7 SUPPRESS. IS THAT REALLY EVIDENCE THAT IS GOING TO COME IN
09:11AM 8 BEFORE THIS JURY?

09:11AM 9 SO WE HAVE A LOT OF CONCERNS. WE THINK THIS REALLY IS FAR
09:11AM 10 AFIELD FROM THE FACTS THAT ARE CURRENTLY AT ISSUE IN THIS CASE.

09:11AM 11 WE UNDERSTAND THAT THE DEFENSE WANTS TO PUT ON A DEFENSE
09:11AM 12 OF THEIR CHOOSING, BUT IT STILL HAS TO BE A RELEVANT DEFENSE,
09:11AM 13 IT HAS TO BE TETHERED TO THE CHARGES AGAINST MR. BALWANI. AND
09:11AM 14 THAT'S NOT WHAT WE'RE LOOKING AT HERE.

09:11AM 15 THE COURT: OKAY. THANK YOU.

09:11AM 16 IS HE A FORENSIC EXPERT?

09:11AM 17 MR. BRECHER: HE'S A VETERAN OF MANY FORENSIC
09:11AM 18 INVESTIGATIONS, YOUR HONOR. I DON'T KNOW IF HE --

09:11AM 19 THE COURT: IS HE A FORENSIC EXPERT? DO YOU INTEND
09:11AM 20 TO OFFER HIM AS A FORENSIC EXPERT?

09:11AM 21 MR. BRECHER: NOT AS A FORENSIC EXPERT, YOUR HONOR.

09:11AM 22 WE INTEND TO OFFER HIM PRECISELY FOR WHAT WE DISCLOSED
09:11AM 23 HIM AS, WHICH MS. VOLKAR SLIGHTLY MISSTATED. HE SAID, AND THIS
09:11AM 24 IS IN HIS DECLARATION, THAT HE'S AN EXPERT IN SQL SERVERS,
09:12AM 25 THEIR ENCRYPTION, AND THEIR RECOVERY, IN OTHER WORDS, HOW YOU

09:12AM 1 ENCRYPT THEM AND HOW YOU RECOVER THEM. AND THAT COVERS

09:12AM 2 EVERYTHING WE NEED TO COVER.

09:12AM 3 FRANKLY, YOUR HONOR, ALL WE NEED TO KNOW IS THAT THE

09:12AM 4 GOVERNMENT WAS ADVISED OF A WAY WHICH THEY COULD HAVE SECURED

09:12AM 5 THIS DATA, AND MR. SONNIER WOULD AGREE THAT WOULD HAVE WORKED.

09:12AM 6 WE DON'T NEED TO GO BEYOND THAT.

09:12AM 7 I DO WANT TO RESPOND TO A FEW ELEMENTS OF MS. VOLKAR'S

09:12AM 8 COMMENTS, AND I GUESS IT'S DAYS LIKE TODAY I'M GRATEFUL THAT

09:12AM 9 THERE'S A TRANSCRIPT BECAUSE THEY JUST DON'T BEAR ANY

09:12AM 10 RESEMBLANCE TO WHAT I JUST SAID A FEW MOMENTS AGO.

09:12AM 11 THE NOTION THAT THE DEFENSE WANTS TO ADMIT CHERRY PICKED

09:12AM 12 FACTS AND THEN BLOCK THE GOVERNMENT FROM PUTTING IN CONTEXT --

09:12AM 13 I BELIEVE I SAID THREE TIMES THIS MORNING THAT WE WANT TO MAKE

09:12AM 14 SURE THAT THE CONTEXT SURROUNDING THE ENCRYPTED COPY IS SHARED

09:12AM 15 WITH THE JURY SO THAT THEY UNDERSTAND FULLY THIS PICTURE.

09:12AM 16 THE DEFENSE EXPRESSES -- EXCUSE ME, THE GOVERNMENT

09:12AM 17 EXPRESSES INCREDULITY ABOUT THE USE OF A BRADY LETTER.

09:12AM 18 WELL, YOUR HONOR, I DON'T THINK USING AN 801(D) PARTY

09:13AM 19 ADMISSION AS EVIDENCE IS AT ALL UNUSUAL. WE LITERALLY HAD THIS

09:13AM 20 CONVERSATION LAST WEEK, AND MR. LEACH WAS STANDING UP IN

09:13AM 21 MS. VOLKAR'S SPOT SAYING, YOUR HONOR, I'M STUNNED. THESE ARE

09:13AM 22 STATEMENTS BY MR. BALWANI ABOUT THE FACTS IN THIS CASE. OF

09:13AM 23 COURSE THEY'RE ADMISSIBLE.

09:13AM 24 YOUR HONOR, THESE ARE STATEMENTS BY MR. LEACH NOT ONLY

09:13AM 25 ABOUT THE FACTS OF THIS CASE, BUT IN THIS CASE. OF COURSE

09:13AM 1 THEY'RE ADMISSIBLE.

09:13AM 2 THE COURT: WHAT ARE YOUR THOUGHTS ON THAT,

09:13AM 3 MS. VOLKAR?

09:13AM 4 MS. VOLKAR: I THINK IT'S IRRELEVANT. I THINK WE'RE

09:13AM 5 REALLY TALKING PAST EACH OTHER HERE. MR. BRECHER IS EXPLAINING

09:13AM 6 WHY IT'S NOT HEARSAY. I DID NOT HEAR MYSELF SAY THAT THE BRADY

09:13AM 7 LETTER IS HEARSAY. I'M SORRY, I'M MISSING THAT CONNECTION.

09:13AM 8 I'M SAYING IT'S ENTIRELY IRRELEVANT TO THIS CASE. AND

09:13AM 9 RELEVANCE RULE 401 COMES BEFORE RULE 108 FOR A REASON.

09:13AM 10 RELEVANCE IS THE THRESHOLD DECISION THAT THE COURT MUST MAKE.

09:13AM 11 WE ARE HERE TODAY TO ARGUE ABOUT HOW IRRELEVANT A LOT OF

09:13AM 12 THIS -- AND PARTICULARLY MR. SONNIER'S DECLARATION IS.

09:14AM 13 BUT THE BRADY LETTER, I WOULD ALSO ARGUE AND THE FACTS

09:14AM 14 THAT ARE INCLUDED THEREIN, IRRELEVANT. I HAVEN'T HEARD A

09:14AM 15 THEORY FROM MR. BRECHER THAT CHANGES THAT PERSPECTIVE.

09:14AM 16 IF I WERE ARGUING HEARSAY, SURE, MAYBE I WOULD HAVE TO EAT

09:14AM 17 THE WORDS OF MY COLLEAGUE, BUT THAT'S NOT WHAT I'M ARGUING

09:14AM 18 TODAY.

09:14AM 19 MR. BRECHER: THANK YOU, YOUR HONOR.

09:14AM 20 AND I THINK THAT OUR THEORY OF RELEVANCE IS PRECISELY THE

09:14AM 21 ONE THAT WE LAID OUT IN OUR PLEADINGS AND IT'S THE THEORY OF

09:14AM 22 RELEVANCE THAT HAS BEEN BLESSED REPEATEDLY BY THE SUPREME COURT

09:14AM 23 AND BY THE NINTH CIRCUIT, AND THAT IS, MS. VOLKAR SUGGESTS --

09:14AM 24 FIRST OF ALL, WE NEVER SAID WE WOULD ACCUSE THE GOVERNMENT OF

09:14AM 25 BAD FAITH. IN FACT, I THINK I SAID NEGLIGENCE OR RECKLESSNESS

09:14AM 1 AT THE MOST.

09:14AM 2 BUT THE SUGGESTION WAS, AND APPARENTLY IT WAS CONCERNING

09:14AM 3 TO THE GOVERNMENT, THAT WE MIGHT POINT THE FINGER AT THE

09:14AM 4 GOVERNMENT AND SAY LOOK AT WHAT THEY DIDN'T DO.

09:14AM 5 WELL, YEAH, THAT'S WHAT THE NINTH CIRCUIT EXPRESSLY

09:14AM 6 ALLOWED. IT IS ALLOWED IN EVERY CRIMINAL CASE IN WHICH THE

09:14AM 7 FACTS IMPLICATE IT, AND THE FACTS DO IMPLICATE IT HERE.

09:14AM 8 I HEARD A -- I GUESS TWO DIFFERENT CLAIMS. ONE WHICH

09:14AM 9 APPEARS FOR THE FIRST TIME IN THE GOVERNMENT'S REPLY BRIEF IN A

09:15AM 10 FOOTNOTE, WHICH SAYS THAT THE GOVERNMENT IS NOT ASKING THE

09:15AM 11 COURT TO DRAW ANY FACTUAL DETERMINATIONS ABOUT -- AT THE

09:15AM 12 PRELIMINARY STAGE, BUT INSTEAD, JUST TO MAKE THE LEGAL

09:15AM 13 DETERMINATION OF RELEVANCE.

09:15AM 14 THAT DOESN'T QUITE WORK, YOUR HONOR.

09:15AM 15 IN ORDER TO DO THAT, THE COURT HAS TO ASSUME, AND THIS IS

09:15AM 16 THE U.S. V. EVANS CASE FROM THE NINTH CIRCUIT, THE COURT HAS TO

09:15AM 17 ASSUME THAT THE EVIDENCE THAT WE'VE PUT IN IS ACCURATE AND

09:15AM 18 TRUE. THE COURT IS NOT TO WEIGH CREDIBILITY AT THESE 104

09:15AM 19 STAGES.

09:15AM 20 AND THE GOVERNMENT IS VERY MUCH ASKING, YOUR HONOR, TO

09:15AM 21 MAKE A FACTUAL DETERMINATION. I KNOW THAT BECAUSE THEY SAY SO.

09:15AM 22 IF YOU LOOK AT THE MOTION, THE GOVERNMENT -- THE ORIGINAL

09:15AM 23 MOTION, NOT THE REPLY, THE GOVERNMENT RECITES FOUR SEPARATE

09:15AM 24 TIMES THAT THE STANDARD THAT THEY'RE LOOKING TO IS A

09:15AM 25 PREPONDERANCE OF THE EVIDENCE STANDARD.

09:15AM 1 YOUR HONOR, THAT'S A FACTUAL STANDARD. A LEGAL CONCLUSION
09:15AM 2 DOESN'T REQUIRE EVIDENCE FROM EITHER SIDE.
09:15AM 3 AND, SECOND, THEY CITE A DECISION, UNITED STATES VERSUS
09:15AM 4 PEREZ, WHICH IS EXCLUSIVE ON THIS POINT. IT DISCUSSES RULE
09:16AM 5 104(B) AND PRELIMINARY FACTUAL DETERMINATIONS.
09:16AM 6 I ALSO WANT TO TURN TO THE POINT THAT THE GOVERNMENT
09:16AM 7 ALREADY -- EXCUSE ME, THAT THE COURT ALREADY DECIDED THIS
09:16AM 8 QUESTION. AND I'M, FRANKLY, BEFuddled BY THAT.
09:16AM 9 WHAT YOUR HONOR RULED IN DOCKET 1326, WAS THAT OUR MOTION
09:16AM 10 TO SUPPRESS WAS DENIED. THE COURT DIDN'T CREDIT MR. SONNIER'S
09:16AM 11 OPINION OVER THE 302'S OF ONE THERANOS EMPLOYEE AND ONE
09:16AM 12 THERANOS CONSULTANT, BUT THAT DOESN'T MEAN THAT THE JURY
09:16AM 13 DOESN'T GET TO DRAW A DIFFERENT CONCLUSION.
09:16AM 14 AND I WORRY SOMETIMES, YOUR HONOR, THAT WE'VE BEEN SO
09:16AM 15 FOCUSSSED ON THIS CASE, WHICH IS VERY DISTINCTIVE IN A LOT OF
09:16AM 16 WAYS, THAT WE SOMETIMES VEER AWAY FROM THE BASICS OF CRIMINAL
09:16AM 17 PRACTICE AS THEY GO ON IN COURTROOMS ALL ACROSS THE COUNTRY
09:16AM 18 EVERY SINGLE DAY.
09:16AM 19 YOUR HONOR, TONIGHT AFTER COURT IF I GET ARRESTED, PERHAPS
09:16AM 20 MS. VOLKAR WILL HAVE CALLED IN AN ANONYMOUS TIP, AND I MAKE
09:16AM 21 APPARENTLY SOME SELF-INCRIMINATING STATEMENT, I CAN GO TO THE
09:16AM 22 COURT, MY TRIAL JUDGE, AND I CAN SAY, YOUR HONOR, I WANT THAT
09:16AM 23 STATEMENT SUPPRESSED, THE COPS BEAT ME UP. AND WHAT WOULD
09:17AM 24 HAPPEN IS THERE WOULD BE AN EVIDENTIARY HEARING. AND THE COURT
09:17AM 25 CAN SIDE WITH THE OFFICERS. THE COURT CAN SAY, YOU KNOW WHAT,

09:17AM 1 I'M CREDITING THE OFFICERS, I'M NOT CREDITING YOU, YOUR
09:17AM 2 SELF-INCRIMINATING STATEMENT COMES IN.

09:17AM 3 SO FAR, THAT'S EXACTLY WHAT HAPPENED IN CONNECTION WITH
09:17AM 4 THE MOTION TO SUPPRESS HEARING. WE OFFERED ONE VERSION OF THE
09:17AM 5 EVENTS, AND THE GOVERNMENT OFFERED A DIFFERENT ONE, AND
09:17AM 6 YOUR HONOR CREDITED THE GOVERNMENT'S VERSION.

09:17AM 7 BUT THIS IS WHERE WE PART WAYS, YOUR HONOR. IF THAT
09:17AM 8 HAPPENS TO ME, I'M STILL ABSOLUTELY ALLOWED TO TELL THE JURY AT
09:17AM 9 TRIAL, YOU SHOULD NOT GIVE CREDENCE TO THAT STATEMENT BECAUSE
09:17AM 10 IT WAS COERCED, BECAUSE EVEN IF MY TRIAL JUDGE DIDN'T BELIEVE
09:17AM 11 ME, 12 JURORS MIGHT. THAT'S EXACTLY WHAT WE'RE DEALING WITH
09:17AM 12 HERE.

09:17AM 13 I CAN'T, YOUR HONOR, LET GO THE NOTION THAT MR. BALWANI
09:17AM 14 COULD HAVE DONE MORE OR COULD HAVE STOPPED THE DESTRUCTION OF
09:17AM 15 THE LIS.

09:17AM 16 FIRST OF ALL, IT WASN'T DESTROYED, AS MR. SONNIER
09:17AM 17 CONFIRMS. BUT MR. BALWANI DOESN'T HAVE THE POWER TO SEIZE THE
09:18AM 18 SERVERS. HE NEVER DID. THE GOVERNMENT CERTAINLY DOES.
09:18AM 19 ALTHOUGH, ODDLY, IN THEIR REPLY THEY SUGGEST THAT THAT QUESTION
09:18AM 20 IS IN DOUBT.

09:18AM 21 BUT, MR. BALWANI, I DON'T KNOW, I GUESS HE SHOULD HAVE
09:18AM 22 BROKEN IN, IN THE DEAD OF NIGHT TO THESE WAREHOUSES AT
09:18AM 23 IRON MOUNTAIN AND MADE OFF WITH THE SERVERS. TYPICALLY
09:18AM 24 PROSECUTORS FROWN ON THAT.

09:18AM 25 BUT THE ISSUE HERE, YOUR HONOR, IS THAT MR. BALWANI DID

09:18AM 1 CONSULT A CONSULTANT AND TRIED TO HIRE A CONSULTANT. WE PUT IN
09:18AM 2 THAT RETENTION LANGUAGE IN THE DECLARATION OF MR. COOPERSMITH
09:18AM 3 IN SUPPORT OF OUR OPPOSITION. AND THE CONTEXT, THE CHRONOLOGY
09:18AM 4 THAT THE GOVERNMENT HAS NEVER, EVER ACKNOWLEDGED IS THE POINT
09:18AM 5 THAT THE DAY BEFORE THE DISASSEMBLY, MR. CHANDRASEKARAN TOLD
09:18AM 6 MR. CADDENHEAD, THIS IS WHAT I NEED, I NEED A COPY OF THIS
09:18AM 7 DIRECTORY TO DO MY WORK.

09:18AM 8 AND THE NEXT DAY, MR. CADDENHEAD SAID, I'VE GOT THAT COPY,
09:18AM 9 ALL CLEAR TO SHUT DOWN. SO THERE'S NOTHING MORE THAT
09:19AM 10 MR. BALWANI COULD HAVE OR SHOULD HAVE DONE.

09:19AM 11 SECOND, IT WAS THE GOVERNMENT WHO WAS ADVISED BY A LIS
09:19AM 12 SUPERVISOR THAT YOU COULD HAVE GOTTEN THE SERVERS. THERE'S NO
09:19AM 13 SUGGESTION THAT MR. BALWANI RECEIVED THAT SAME ADVICE.

09:19AM 14 AND AT THE TIME THAT THE GOVERNMENT RECEIVED THAT ADVICE
09:19AM 15 FROM THEIR OWN TECHNICAL SUPPORT, MR. SONNIER SAYS THEY COULD
09:19AM 16 HAVE DONE THAT. THEY COULD HAVE DONE IT RIGHT THEN IN OCTOBER,
09:19AM 17 THEY COULD HAVE DONE IT FOR MONTHS AFTERWARDS. THAT
09:19AM 18 INFORMATION AND THOSE CLAIMS, IN EVALUATING THESE PRELIMINARY
09:19AM 19 ADMISSIBILITY QUESTIONS, HAVE TO BE BELIEVED BEFORE YOUR HONOR
09:19AM 20 CAN MAKE THE THRESHOLD RELEVANCE DETERMINATION.

09:19AM 21 THE COURT: SO TELL ME, WHAT DOES ALL OF THIS HAVE
09:19AM 22 TO DO WITH THIS CASE?

09:19AM 23 MR. BRECHER: WELL, YOUR HONOR, THIS IS SORT OF A
09:19AM 24 STUNNING CLAIM BY THE GOVERNMENT. BUT THE GOVERNMENT SEEMS TO
09:19AM 25 BE SUGGESTING THAT THE CENTRAL REPOSITORY OF PATIENT TESTING

09:19AM 1 DATA IS ONLY MARGINALLY RELEVANT TO A CASE ABOUT THE ACCURACY
09:19AM 2 OF PATIENT TESTS.

09:19AM 3 I'VE NEVER HEARD SUCH A CLAIM, YOUR HONOR, BUT THAT'S NOT
09:19AM 4 WHAT --

09:19AM 5 THE COURT: IS THERE SOME DISPUTE ABOUT WHAT IS
09:20AM 6 ACTUALLY IN THE LIS AND WHAT CAN BE DONE WITH IT?

09:20AM 7 MR. BRECHER: THERE MAY BE SOME DISPUTE, YOUR HONOR.

09:20AM 8 THE GOVERNMENT POINTED TO TESTIMONY BY MS. CHEUNG AND
09:20AM 9 TESTIMONY THAT I DIDN'T THINK WAS ON POINT BY MS. BENNETT, BUT
09:20AM 10 THAT'S --

09:20AM 11 THE COURT: AND DR. ROSENDORFF.

09:20AM 12 MR. BRECHER: AND DR. ROSENDORFF.

09:20AM 13 BUT WHAT DR. ROSENDORFF SAID IS WHEN I WOULD RECEIVE
09:20AM 14 CLINICIAN CONCERNS, I WOULD QUERY THE LIS DATABASE IN
09:20AM 15 COMBINATION WITH OTHER INFORMATION. I WOULD LOOK TO PATIENT
09:20AM 16 TREND DATA, WHICH IS IN THE LIS AS HIS TESTIMONY CONFIRMS. I
09:20AM 17 WOULD LOOK TO QUALITY CONTROL DATA, WHICH IS IN THE LIS AS HIS
09:20AM 18 TESTIMONY CONFIRMS.

09:20AM 19 THE COURT: SO THIS GOES TO YOUR ARGUMENT, THE
09:20AM 20 DEFENSE ARGUMENT, THAT THE LIS ISN'T HERE, THEREFORE, LADIES
09:20AM 21 AND GENTLEMEN, YOU SHOULD HAVE A DOUBT ABOUT THE GOVERNMENT'S
09:20AM 22 CASE, THEIR ALLEGATIONS IN THE INDICTMENT AS TO THOSE COUNTS?

09:20AM 23 MR. BRECHER: AND ARGUMENT, YES, YOUR HONOR.

09:20AM 24 AND WE DON'T INTEND TO LAY ANY MORE FOUNDATION SUPPORTING
09:21AM 25 THAT. WE THINK DR. ROSENDORFF'S TESTIMONY GIVES US ALL WE NEED

09:21AM 1 TO ARGUE THAT POINT.

09:21AM 2 THE COURT: BUT YOU HAVE THAT NOW, DON'T YOU?

09:21AM 3 MR. BRECHER: WE -- YES, THAT'S PRECISELY THE POINT

09:21AM 4 I'M MAKING, YOUR HONOR.

09:21AM 5 BUT WHAT WE ARE ALLOWED TO MAKE -- AND AGAIN, THE

09:21AM 6 NINTH CIRCUIT AND THE SUPREME COURT HAVE MADE THIS CRYSTAL

09:21AM 7 CLEAR, IS THAT WE'RE ALLOWED TO SAY THE GOVERNMENT COULD HAVE

09:21AM 8 DONE MORE, AND THEN MR. SONNIER CAN SAY THAT IN TESTIMONY.

09:21AM 9 AND WE CAN SAY IN CLOSING, AND YOU KNOW WHAT, YOU SHOULD

09:21AM 10 CONCLUDE THAT THE GOVERNMENT SHOULD HAVE DONE MORE. THAT'S

09:21AM 11 BLACK LETTER LAW, YOUR HONOR.

09:21AM 12 THE COURT: IF THAT HAPPENS THEN, WHAT SHOULD THE

09:21AM 13 COURT DO ABOUT ECF PAGE 9 OF 1454, LINE 7 THROUGH 15?

09:21AM 14 MR. BRECHER: I'M SORRY, YOUR HONOR. LET ME JUST

09:21AM 15 PULL THAT UP.

09:21AM 16 MS. VOLKAR: COULD I HAVE THAT ONE MORE TIME,

09:21AM 17 PLEASE, YOUR HONOR.

09:21AM 18 THE COURT: SURE. IT'S 1454, PAGE 9, LINES 8

09:21AM 19 THROUGH 15.

09:21AM 20 MR. BRECHER: THANK YOU, YOUR HONOR. THAT'S

09:21AM 21 PRECISELY THE ISSUE THAT I WAS HOPING TO TAKE UP.

09:22AM 22 WE DO NOT DISPUTE THAT THE GOVERNMENT WOULD BE ENTITLED TO

09:22AM 23 PUT ON SOME SORT OF REBUTTAL CASE, IF INDEED THEY FEEL THEY

09:22AM 24 NEED TO.

09:22AM 25 BUT AGAIN, WE INTEND TO PUT INTO EVIDENCE THAT THE

09:22AM 1 GOVERNMENT WAS DELIVERED AN UNOPENABLE AND UNDECRYPTABLE COPY,

09:22AM 2 SO I DON'T KNOW THAT THEY NEED TO DO ANYMORE.

09:22AM 3 BUT THE IMPORTANT THING THAT MR. BALWANI NEEDS, AND,

09:22AM 4 FRANKLY, GIVEN THAT WE'VE PROFFERED SO MUCH OF WHAT

09:22AM 5 MR. SONNIER'S WOULD BE, WE THINK WE NEED SOME GUIDANCE FROM THE

09:22AM 6 COURT ON WHAT SORT OF REBUTTAL WE'RE LOOKING AT IN ORDER TO

09:22AM 7 MAKE A FAIR DECISION ON WHETHER TO CALL MR. SONNIER. IT HAS TO

09:22AM 8 BE CABINED IN CERTAIN WAYS.

09:22AM 9 THE GOVERNMENT HAS PROPOSED IN THEIR MOTION A LIST OF

09:22AM 10 WITNESSES AND CONCEPTS THAT SEEMS TO INCLUDE EVERY DENIZEN OF

09:22AM 11 THE BAY AREA EXCEPT FOR MY COUSIN DEBRA, AND THAT'S JUST

09:22AM 12 COMPLETELY INAPPROPRIATE.

09:22AM 13 THE COURT: I'M SORRY. EXCLUDING YOUR COUSIN DEBRA,

09:22AM 14 WHO ARE THEY TALKING ABOUT?

09:22AM 15 MR. BRECHER: THEY WANT TO CALL MR. CADDENHEAD AND

09:23AM 16 MR. CHUNG, C-H-U-N-G, WHICH I THINK IS RESPECTFULLY ABOVE

09:23AM 17 BOARD.

09:23AM 18 THEY WOULD LIKE TO CALL MR. CHANDRASEKARAN, WHICH I THINK

09:23AM 19 IS APPROPRIATE DEPENDING ON THE QUESTIONS THAT THEY ASK HIM.

09:23AM 20 WE THINK THERE ARE SOME QUESTIONS THAT WOULD BE OUT OF BOUNDS.

09:23AM 21 THEY APPARENTLY INTEND TO CALL AN UNTOLD NUMBER OF

09:23AM 22 LAWYERS FROM WILMER HALE.

09:23AM 23 THEY INTEND TO CALL JOHN MCCHESENEY, WHICH IS OPERATIONS

09:23AM 24 HEAD AT THERANOS, WHO IS SOMEONE WHO HAD NOTHING TO DO WITH THE

09:23AM 25 TECHNICAL UNDERSTANDINGS OF MR. SONNIER'S TESTIMONY, WHICH IS

09:23AM 1 WHAT THE GOVERNMENT COULD HAVE DONE.

09:23AM 2 THEY ALSO INTEND TO CALL DR. STEVEN MASTER AND

09:23AM 3 DR. KINGSHUK DAS APPARENTLY TO TALK ABOUT THE VALUE OF THE LIS,

09:23AM 4 BUT THAT WOULD JUST BE REPEATING PORTIONS OF THEIR

09:23AM 5 CASE-IN-CHIEF. MR. SONNIER IS NOT GOING TO GET INTO ANY OF

09:23AM 6 THAT.

09:23AM 7 SO WHERE ARE THE LINES DRAWN?

09:23AM 8 MR. SONNIER IS GOING TO SAY, IF YOUR HONOR PERMITS US TO

09:23AM 9 PUT ON HIS TESTIMONY, THAT THE GOVERNMENT KNEW THAT IT HAD AN

09:23AM 10 OPTION TO SEIZE THE SERVERS. AND HE'S GOING TO SAY, "IN MY

09:23AM 11 OPINION, IN MY EXPERT OPINION, THAT WOULD HAVE WORKED." THAT'S

09:24AM 12 IT. THAT'S ESSENTIALLY THE SUM TOTAL OF WHAT WE WANT FROM

09:24AM 13 MR. SONNIER. THERE WILL BE SOME CONTEXT TO ESTABLISH HIS

09:24AM 14 EXPERT CREDENTIALS AND SOME FACTUAL FOUNDATION TO EXPLAIN THIS

09:24AM 15 ISSUE OF THE ENCRYPTED COPY. BUT THAT'S ALL WE'RE GOING TO

09:24AM 16 SAY.

09:24AM 17 IF THE GOVERNMENT WANTS TO CALL MR. CADDENHEAD AND

09:24AM 18 MR. CHUNG TO SAY, IN FACT, THE LIS, ONCE IT WAS DISASSEMBLED,

09:24AM 19 WOULD HAVE BEEN IMPOSSIBLE TO REASSEMBLE SO MR. SONNIER IS

09:24AM 20 WRONG, THAT'S FINE. THAT'S TRIAL. I HAVE NO OBJECTION TO

09:24AM 21 THAT.

09:24AM 22 IF THEY WANT TO CALL MR. CHANDRASEKARAN TO SAY, I DESIGNED

09:24AM 23 THE LIS, AND I THINK THAT IT WOULD HAVE BEEN IMPOSSIBLE TO

09:24AM 24 ASSEMBLE OR REASSEMBLE, THAT'S FINE. THAT'S NOT WHAT HE'S TOLD

09:24AM 25 THE GOVERNMENT IN HIS 302 OR IN THE RECORDING OF HIS INTERVIEW

09:24AM 1 THAT WE HAVE, BUT I GUESS WE'LL JUST HAVE TO SAVE THAT FOR
09:24AM 2 CROSS.

09:24AM 3 BUT IT'S WHEN YOU GO BEYOND THAT. IT'S THE SUGGESTION
09:25AM 4 THAT MR. BALWANI HAD SOME NEFARIOUS ROLE IN THIS WHOLE
09:25AM 5 SCENARIO, THAT'S COMPLETELY INAPPROPRIATE.

09:25AM 6 THE COURT: IS IT ADMISSIBLE THAT WHILE HE WAS COO
09:25AM 7 OF THE COMPANY, THEY RECEIVED SUBPOENAS FOR THIS MATERIAL?

09:25AM 8 MR. BRECHER: IT WOULD BE ADMISSIBLE IF IT WERE
09:25AM 9 TRUE, YOUR HONOR.

09:25AM 10 THE GOVERNMENT'S MOTION DOES A NEAT LITTLE TRICK HERE.
09:25AM 11 WHAT THEY SAY IS THERANOS RECEIVED A PRESERVATION ORDER FROM
09:25AM 12 THE S.E.C. WHILE MR. BALWANI WAS COO IN OCTOBER 2015. BUT THE
09:25AM 13 SUBPOENAS CAME LATER, AFTER MR. BALWANI'S DEPARTURE.

09:25AM 14 AND AS THE COURT KNOWS, OR SHOULD KNOW, AND I DON'T THINK
09:25AM 15 THE GOVERNMENT DISPUTES, ALL OF THE RELEVANT DATA WAS PRESERVED
09:25AM 16 WHILE MR. BALWANI WAS COO.

09:25AM 17 SO IF THEY WANT TO PUT THAT IN IF IT'S TRUE -- IT'S NOT,
09:25AM 18 BUT I GUESS THEY CAN DO THAT.

09:25AM 19 BUT --

09:25AM 20 THE COURT: SO THE PRESERVATION LETTER WOULD COME
09:25AM 21 IN?

09:25AM 22 MR. BRECHER: I DON'T SEE THE RELEVANCE OF THE
09:25AM 23 PRESERVATION LETTER, YOUR HONOR, BECAUSE MR. BALWANI COMPLIED
09:25AM 24 WITH IT.

09:25AM 25 THERE'S NOT A HINT ANYWHERE THAT HE DIDN'T. HE LEFT --

09:26AM 1 THE COURT: SO IS THE GOVERNMENT -- AS YOU TOLD ME

09:26AM 2 EARLIER THIS MORNING, YOU WANT TO BE FAIR TO THE GOVERNMENT.

09:26AM 3 SO IF WE GO DOWN THIS ROAD, SHOULDN'T THE GOVERNMENT BE

09:26AM 4 ENTITLED TO TELL AT LEAST WHAT THEY BELIEVE THE FULL STORY IS?

09:26AM 5 THEY REQUESTED MANY TIMES THIS SERVER, THIS DATABASE;

09:26AM 6 THEY WERE STALLED; THEY WERE STALLED; THEY WERE STALLED.

09:26AM 7 AND THEN FOUR DAYS BEFORE THE DECOMMISSIONING, THEY

09:26AM 8 RECEIVED WHAT IS PURPORTED TO BE, AND MAYBE THIS IS WHY THE

09:26AM 9 ATTORNEYS ARE ON THE WITNESS LIST, I SUPPOSE THEY WOULD BE

09:26AM 10 CALLED TO SAY, DID YOU GIVE US THIS?

09:26AM 11 YES, WE DID.

09:26AM 12 DID YOU MAKE REPRESENTATIONS ABOUT ITS INTEGRITY, OR DID

09:26AM 13 YOU TELL US THAT WE NEEDED A KEY, OR ANY OF THOSE TYPES OF

09:26AM 14 THINGS?

09:26AM 15 SHOULDN'T THEY BE ABLE TO TELL THAT STORY?

09:26AM 16 MR. BRECHER: SURE.

09:26AM 17 AND, YOUR HONOR, I DON'T PARTICULARLY CARE ABOUT THAT

09:26AM 18 STORY BECAUSE IT HAS NOTHING TO DO WITH MY CLIENT.

09:26AM 19 THE COURT: RIGHT.

09:26AM 20 MR. BRECHER: AND THE ISSUE IS, I REALLY DO HOPE

09:27AM 21 THAT I MADE CLEAR, WE INTEND TO DRAW OUT SOME OF THOSE FACTS

09:27AM 22 USING THE BRADY LETTER PRECISELY SO THE JURY CAN UNDERSTAND

09:27AM 23 THAT CONTEXT.

09:27AM 24 AS I SAID, WE DON'T SEE THE BASIS FOR ADMITTING A

09:27AM 25 PRESERVATION NOTICE ISSUED WHILE MR. BALWANI WAS AT THE COMPANY

09:27AM 1 ALMOST THREE YEARS, IN FACT, BEFORE THE DISASSEMBLY OF THE LIS
09:27AM 2 SYSTEM. THE TWO HAVE NOTHING TO DO WITH ONE ANOTHER.

09:27AM 3 AND WE DON'T SEE HOW THE GOVERNMENT SHOULD BE ALLOWED TO
09:27AM 4 SANDBAG THE DEFENSE BY PUTTING ON EVIDENCE ABOUT SYSTEMIC
09:27AM 5 INACCURACIES IN PATIENT TESTING DATA WHEN WE'RE NOT -- THAT'S
09:27AM 6 NOT WHAT WE'RE USING MR. SONNIER TO CHALLENGE.

09:27AM 7 THE LIMITS OF HIS TESTIMONY ARE PRECISELY, THAT THE
09:27AM 8 GOVERNMENT WAS TOLD THAT IT COULD HAVE DONE MORE, AND IF IT
09:27AM 9 WOULD HAVE DONE MORE, THAT WOULD HAVE WORKED. AGAIN, I KEEP
09:27AM 10 GOING BACK TO --

09:27AM 11 THE COURT: SO THEY'RE ENTITLED TO SAY WHY THEY
09:27AM 12 DIDN'T DO MORE?

09:27AM 13 MR. BRECHER: YES, I THINK THAT THAT'S FINE.

09:27AM 14 WHAT THEY CAN'T DO, THOUGH, IS PIN THE BLAME ON
09:27AM 15 MR. BALWANI.

09:27AM 16 AND I'VE SEEN A LOT OF THAT IN THE BRIEFING, YOUR HONOR.

09:27AM 17 AND IT'S A REALLY SINISTER INSINUATION THAT HAS NO BASIS IN LAW
09:28AM 18 OR IN FACT.

09:28AM 19 MR. BALWANI TRIED DOGGEDLY TO GET A COPY OF THIS
09:28AM 20 INFORMATION. THAT IS WHAT ALL OF THE DOCUMENTS SUPPORT.

09:28AM 21 THERE'S NO DOCUMENT THAT SUGGESTS OTHERWISE. AND THIS --

09:28AM 22 THE COURT: SO THEY CAN TEST THAT.

09:28AM 23 MR. BRECHER: I DON'T THINK SO, YOUR HONOR, BECAUSE
09:28AM 24 THERE'S NO GOOD BASIS FOR THE SUGGESTION THAT MR. BALWANI WAS
09:28AM 25 INVOLVED IN THE DESTRUCTION AND HAD NO LEGAL DUTY TO AVOID THIS

09:28AM 1 DISASSEMBLY.

09:28AM 2 BUT IF YOUR HONOR DISAGREES ABOUT THE GOOD FAITH BASIS FOR

09:28AM 3 THAT, THAT'S NOT THE HILL THAT I'M GOING TO DIE ON TODAY.

09:28AM 4 WHAT I DO WANT TO MAKE SURE IS CLEAR AND THE BOUNDARIES

09:28AM 5 THAT WE SHOULD ESTABLISH ARE, IT'S JUST NOT THE NUMBER OF

09:28AM 6 WITNESSES THAT THE GOVERNMENT NAMES. THEY ALSO SAY, WELL, WE

09:28AM 7 NEED TO GET INTO THE JOINT DEFENSE PRIVILEGE TO THE EXTENT ANY

09:28AM 8 EXISTS BETWEEN MS. HOLMES AND MR. BALWANI, OR MR. BALWANI AND

09:28AM 9 THERANOS. WE NEED TO INTRODUCE EVIDENCE OF ALL OF THE PRIOR

09:28AM 10 LITIGATION.

09:28AM 11 I JUST DON'T GET IT, YOUR HONOR. AND IT'S SOMEWHAT IRONIC

09:29AM 12 THAT WE'RE PROPOSING TESTIMONY THAT WOULD PROBABLY LAST 90

09:29AM 13 MINUTES TO 2 HOURS.

09:29AM 14 THE GOVERNMENT NAMES NINE WITNESSES AND FIVE CATEGORIES OF

09:29AM 15 INFORMATION AND SAYS, YOUR HONOR, THE DEFENSE IS THREATENING A

09:29AM 16 MINI TRIAL.

09:29AM 17 THAT DOESN'T WORK. THAT'S NOT WHAT IS GOING ON HERE.

09:29AM 18 WE'RE GOING TO ESTABLISH, WITH THE COURT'S PERMISSION,

09:29AM 19 THAT THE GOVERNMENT KNEW IT COULD HAVE DONE MORE. AND IF IT

09:29AM 20 COULD HAVE DONE AND IF IT HAD TAKEN THAT STEP, THAT WOULD HAVE

09:29AM 21 WORKED, AND WE WOULD HAVE HAD THIS LIS DATA.

09:29AM 22 THE COURT: THE BASIS OF THEIR KNOWLEDGE IS THIS ONE

09:29AM 23 INDIVIDUAL AT -- IT SOUNDS LIKE IT MAY HAVE BEEN A CHARETTE, OR

09:29AM 24 SOMETHING. AND WHAT SHOULD WE DO? AND IDEAS ARE BEING THROWN

09:29AM 25 ABOUT. I'M, OF COURSE, NOT STATING IT LIKE IT REALLY WAS, I'M

09:29AM 1 CERTAIN.

09:29AM 2 MR. BRECHER: OF COURSE.

09:29AM 3 THE COURT: BUT SOMEBODY HAD AN IDEA, AND THAT IDEA

09:29AM 4 WASN'T FOLLOWED. DIFFERENT THINGS, DIFFERENT AVENUES WERE

09:29AM 5 TAKEN. THAT'S WHAT YOU WANT TO GET IN.

09:29AM 6 MR. BRECHER: THAT'S WHAT WE WANT TO GET IN, YES.

09:29AM 7 THE COURT: AND YOU WANT TO SAY THAT BECAUSE OF

09:29AM 8 THAT, THEY HAD THE ABILITY TO DO IT.

09:29AM 9 MR. BRECHER: YES.

09:29AM 10 THE COURT: AND THEY DIDN'T, BECAUSE THEY DIDN'T

09:29AM 11 FOLLOW THAT SUGGESTION.

09:30AM 12 AND THEN YOUR EXPERT WILL SAY, YEAH, THEY SHOULD HAVE

09:30AM 13 LISTENED TO THAT PERSON BECAUSE IN MY OPINION IT COULD HAVE

09:30AM 14 BEEN DONE.

09:30AM 15 MR. BRECHER: OR I THINK HE MIGHT GO BROADER. I

09:30AM 16 THINK HE WOULD SAY IT WOULD HAVE BEEN DONE OR IT'S

09:30AM 17 OVERWHELMINGLY LIKELY TO HAVE BEEN SUCCESSFUL.

09:30AM 18 BUT I DO WANT TO RETURN, YOUR HONOR, BRIEFLY TO THE POINT

09:30AM 19 ABOUT WHAT HAPPENED AFTERWARDS AND WHAT HAPPENS NEXT WITH

09:30AM 20 MR. SONNIER, WHAT THE UPSHOT IS OF HIS TESTIMONY, BECAUSE I SEE

09:30AM 21 REPEATEDLY IN THE BRIEFING THAT BECAUSE THE LIS DATA STANDING

09:30AM 22 ALONE WOULD NOT BE ABLE TO TELL YOU WHETHER A PATIENT TEST

09:30AM 23 RESULT WAS ACCURATE OR INACCURATE, THAT THAT AFFECTS THE

09:30AM 24 ANALYSIS HERE. AND I HAVE TO TELL YOU, THAT ARTICULATION MAKES

09:30AM 25 NO SENSE WHATSOEVER.

09:30AM 1 THE COURT: THAT'S A WEIGHT ISSUE, ISN'T IT?

09:30AM 2 MR. BRECHER: WELL, FIRST OF ALL, IT DEFINITELY IS A

09:30AM 3 WEIGHT ISSUE.

09:30AM 4 BUT GOING BEYOND THAT, YOUR HONOR, THAT'S NOT WHAT ANY OF

09:30AM 5 THE CASES THAT ADDRESS THE RIGHT TO RAISE THE INTEGRITY OR

09:30AM 6 SLOPPINESS OF THE GOVERNMENT'S INVESTIGATION SAY MATTERS.

09:31AM 7 IT ALSO DOESN'T MAKE SENSE OF HOW WE UNDERSTAND

09:31AM 8 EXCULPATORY EVIDENCE IN OUR LAW. AND THE EXAMPLE THAT WE USE

09:31AM 9 IN OUR OPPOSITION, AND I THINK IT'S A POWERFUL ONE, IS THAT'S

09:31AM 10 LIKE SAYING THAT A FINGERPRINT DOESN'T MATTER. A FINGERPRINT

09:31AM 11 IS EXACTLY THE SAME IN A FORENSIC CASE AS THE LIS DATABASE. A

09:31AM 12 FINGERPRINT, YOUR HONOR, AS YOU KNOW, IS JUST A RESIDUE OF OIL

09:31AM 13 AND WATER. BY ITSELF, IT MEANS NOTHING. IT MEANS LESS THAN

09:31AM 14 NOTHING.

09:31AM 15 IT'S ONLY IN COMBINATION WITH OTHER PIECES OF EVIDENCE,

09:31AM 16 WHETHER A MATCHING FINGERPRINT FROM THE DEFENDANT OR FROM AN

09:31AM 17 ALTERNATIVE SUSPECT, OR A MATCH WITHIN A LAW ENFORCEMENT

09:31AM 18 DATABASE, THAT IT HAS EVIDENTIARY VALUE WHETHER INculpatory OR

09:31AM 19 EXCULPATORY. THIS IS THE REPOSITORY OF PATIENT TESTING DATA.

09:31AM 20 AND ONE THING THAT TROUBLES ME, YOUR HONOR, IS THAT I HAVE

09:31AM 21 NOT SEEN ANY ACKNOWLEDGEMENT BY THE GOVERNMENT OR ANY

09:31AM 22 EXPLANATION FOR ITS QUITE SUDDEN AND QUITE DRAMATIC ABOUT FACE

09:31AM 23 ON THE VALUE OF THIS TECHNOLOGY.

09:31AM 24 THE COURT: SO YOU WANT TO SAY THAT THE GOVERNMENT

09:31AM 25 HAD THIS, THEY DIDN'T TAKE ANY ACTION ON IT, AND IN THAT

09:32AM 1 INTERIM, THAT TIME PERIOD, IT WAS LOST AND IT CAN'T BE, IT
09:32AM 2 CAN'T BE RETRIEVED, AND BECAUSE OF THAT, LADIES AND GENTLEMEN,
09:32AM 3 WE DO NOT HAVE THE ABILITY TO BRING IT FORWARD, WHICH WE
09:32AM 4 BELIEVE WOULD HAVE SHOWN IN FULSOME MANNER THAT THE TESTING WAS
09:32AM 5 ACCURATE, ET CETERA, ET CETERA.
09:32AM 6 IS THAT --
09:32AM 7 MR. BRECHER: IN ESSENCE, YOUR HONOR.
09:32AM 8 I DON'T EVEN KNOW THAT WE NEED THE LAST PART. I THINK
09:32AM 9 THAT WE CAN ALLOW THE JURY TO INFER THAT.
09:32AM 10 THE COURT: OR IS IT, OR IS IT, YOU CAN'T TRUST
09:32AM 11 THEIR CASE BECAUSE THEY FUMBLED IT? AND THEY DON'T GET INTO
09:32AM 12 THE END ZONE BECAUSE THEY FUMBLED THE BALL AND IT WENT OUT OF
09:32AM 13 BOUNDS?
09:32AM 14 MR. BRECHER: WELL, BOTH ARE PERMISSIBLE UNDER
09:32AM 15 BINDING LAW, YOUR HONOR.
09:32AM 16 AND ON THAT ISSUE, YOUR HONOR, I WOULD DEFINITELY NEED TO
09:32AM 17 CONSULT WITH MY COLLEAGUES BEFORE COMMITTING TO WHAT WE WOULD
09:32AM 18 SAY AT CLOSING.
09:32AM 19 ALL I WOULD SAY IS BOTH OF THOSE AVENUES OF ARGUMENT ARE
09:32AM 20 PERMISSIBLE UNDER BINDING LAW.
09:33AM 21 THE COURT: OKAY. MS. VOLKAR.
09:33AM 22 MS. VOLKAR: THANKS, YOUR HONOR.
09:33AM 23 I WILL TRY TO TAKE THIS IN TURN. SO THERE ARE TWO THINGS,
09:33AM 24 AND I TRIED TO LAY THIS OUT IN THE INITIAL MOTION.
09:33AM 25 THERE IS THE RELEVANCE TO THE CASE-IN-CHIEF THAT THE

09:33AM 1 GOVERNMENT HAS PUT ON, THE CHARGES AGAINST MR. BALWANI, AND,
09:33AM 2 THAT IS, WE'VE HEARD FROM THE DEFENSE BEFORE, ONE OF THE
09:33AM 3 THEORIES OF RELEVANCE ABOUT LIS BECAUSE THE GOVERNMENT HAS
09:33AM 4 ALLEGED THERANOS WAS UNABLE TO PROVIDE ACCURATE AND RELIABLE
09:33AM 5 TEST RESULTS TO PATIENTS.

09:33AM 6 THEY HAVE DISAVOWED THAT THEORY, AND I JUST HEARD
09:33AM 7 MR. BRECHER SAY THAT AGAIN, AS A BASIS TO HAVE MR. SONNIER
09:33AM 8 TESTIFY AND AS LAID OUT IN THE PLEADINGS. THAT MAKES SENSE
09:33AM 9 BECAUSE HE HAS NO ABILITY TO SAY WHAT WAS IN OR NOT IN LIS.
09:33AM 10 GREAT.

09:33AM 11 BUT LOSING THAT SHAKE IN THE CHAIN DOES MATTER FOR THE
09:34AM 12 THOROUGHNESS OF THEIR INVESTIGATION BECAUSE LOOK AT THE CASES
09:34AM 13 THEY CITE TO, KYLES, HOWELL, CROSBY, ONE OF THE IMPORTANT
09:34AM 14 PARTS, AND, YES, THEY RELATE TO BRADY, BUT ONE OF THE IMPORTANT
09:34AM 15 PARTS IS WAS THIS MATERIAL TO THE DEFENSE?

09:34AM 16 SO YOU CAN'T JUST COMPLETELY IGNORE WHAT THE LIS WAS OR
09:34AM 17 WHAT EVIDENCE IT WOULD HAVE PROVIDED. YOU CAN'T IGNORE THAT.

09:34AM 18 NOW, LET'S GO TO THE THOROUGHNESS OF THE INVESTIGATION,
09:34AM 19 BECAUSE THAT'S THE ONLY THEORY OF RELEVANCE I HAVE HEARD.

09:34AM 20 I WANT TO TAKE A BIG STEP BACK. THE PARTIES VIGOROUSLY
09:34AM 21 DISAGREE ON A LOT OF THE FACTS. WE'VE RECOVERED A LOT OF THAT
09:34AM 22 GROUND THIS MORNING. I'M HAPPY TO GIVE THE GOVERNMENT'S
09:34AM 23 PERSPECTIVE ON ALL OF THEM, BUT ALL THE COURT NEEDS TO DECIDE
09:34AM 24 THIS MOTION IS WHETHER OR NOT ANYTHING THAT MR. SONNIER WOULD
09:34AM 25 SAY WOULD BE RELEVANT.

09:34AM 1 AND THE GOVERNMENT'S POSITION IS THAT NOTHING HE HAS TO

09:34AM 2 SAY IS RELEVANT TO THIS CASE. AND THE ONLY THEORY I HAVE HEARD

09:34AM 3 IS THIS THOROUGHNESS OF THE INVESTIGATION.

09:34AM 4 BUT THIS IS SOMETHING THAT THE GOVERNMENT DID -- AND I

09:34AM 5 ALSO HEARD MR. BRECHER SAY A MOMENT AGO, THE GOVERNMENT

09:35AM 6 COULDN'T TALK ABOUT THE PRESERVATION LETTERS OR SOMETHING LIKE

09:35AM 7 THAT BECAUSE IF IT WERE TRUE.

09:35AM 8 WELL, I FIND THAT -- I HAD TO CHUCKLE A LITTLE BIT HEARING

09:35AM 9 THAT FROM THE DEFENSE, BECAUSE IF IT WERE TRUE, THEN THERE'S A

09:35AM 10 REASON THAT THE GOVERNMENT WOULD BE ABLE TO GET IN A LOT OF

09:35AM 11 EVIDENCE THAT THE DEFENSE PROBABLY WOULD NOT LIKE.

09:35AM 12 SO I WANT TO TAKE A STEP BACK AND SAY, MR. BRECHER GAVE AN

09:35AM 13 EXAMPLE OF THE SUPPRESSION HEARING AND WHAT THE GOVERNMENT

09:35AM 14 WOULD BE ABLE TO -- OR WHAT THE DEFENDANT STILL WOULD BE ABLE

09:35AM 15 TO PRESENT AT TRIAL. THAT EXAMPLE IS ALL OF THE

09:35AM 16 PRE-AUGUST 2018 CONDUCT.

09:35AM 17 THE MOTION TO SUPPRESS WAS LARGEY ABOUT THE STEPS THAT

09:35AM 18 LED TO THE DESTRUCTION OF THE LIS IN AUGUST OF 2018. THAT IS

09:35AM 19 THE PERIOD WHERE THERE IS A LOT OF FACTUAL DISPUTE, AND IF THEY

09:35AM 20 PUT ON EVIDENCE, WE WOULD PROBABLY COUNTER IT.

09:35AM 21 BUT THAT'S NOT WHAT MR. SONNIER WANTS TO TALK ABOUT. HE

09:36AM 22 WANTS TO TALK ABOUT THE POST-AUGUST 2018. AND WHAT HE WANTS TO

09:36AM 23 SAY, IS THAT WHEN THE GOVERNMENT WAS GIVEN MULTIPLE AVENUES,

09:36AM 24 THEY CHOSE ONE, AND THEY CHOSE THE WRONG ONE.

09:36AM 25 BUT AGAIN, I GO BACK TO MR. BRECHER SAID AGAIN, HE'S NOT A

09:36AM 1 FORENSIC EVALUATION EXPERT. HE DOESN'T GET TO SAY OR COMMENT
09:36AM 2 ON WHAT THE GOVERNMENT SHOULD HAVE DONE DIFFERENTLY. THAT'S
09:36AM 3 NOT WHAT HE WAS NOTICED AS. THAT'S NOT WHAT HE'S AN EXPERT IN.
09:36AM 4 THE COURT: SO HE COULD SAY, HE COULD SAY, "I'M AN
09:36AM 5 EXPERT AND I DO BELIEVE THAT IT COULD HAVE BEEN RECONSTRUCTED"?
09:36AM 6 MS. VOLKAR: RIGHT.
09:36AM 7 THE COURT: THAT'S IT.
09:36AM 8 MS. VOLKAR: THAT'S THE GOVERNMENT'S PERSPECTIVE.
09:36AM 9 THAT IS WHAT IS IN HIS QUALIFICATIONS.
09:36AM 10 AND I WANT TO POINT OUT, AND I KNOW I ADDED THIS IN THE
09:36AM 11 FOOTNOTE, BECAUSE AGAIN, I AM TRYING TO STAY AWAY FROM DIGGING
09:36AM 12 TOO MUCH INTO THE FACTS, BUT MR. SONNIER'S DECLARATION,
09:36AM 13 ECF 1158, PARAGRAPH 17 SAYS, "I HAVE SEEN NOTHING TO SUGGEST
09:36AM 14 THAT THERANOS OR ITS LAW FIRM WILMER HALE, WOULD NOT HAVE
09:37AM 15 COOPERATED," PRESUMABLY WITH THE GOVERNMENT, "BY PROVIDING ANY
09:37AM 16 USER I.D.'S OR PASSWORDS OR CREATING ANY NEW USERS NEEDED."
09:37AM 17 HOW IS A SQL DATABASE EXPERT QUALIFIED TO SAY THAT?
09:37AM 18 I HAVE ANOTHER EXAMPLE, YOUR HONOR.
09:37AM 19 THE COURT: YOU'RE NOT GOING TO ASK HIM THAT, ARE
09:37AM 20 YOU, MR. BRECHER?
09:37AM 21 MR. BRECHER: NO.
09:37AM 22 MS. VOLKAR: IN PARAGRAPH 15, THIS ONE IS PROBABLY
09:37AM 23 HARDER FOR THE DEFENSE TO ANSWER, MR. SONNIER SAYS, "THERE IS
09:37AM 24 NOTHING THAT WOULD HAVE STOPPED THE GOVERNMENT FROM OBTAINING
09:37AM 25 POSSESSION OF EITHER OR BOTH THE DISK DRIVES AND SERVER

09:37AM 1 EQUIPMENT BEFORE OR LONG AFTER AUGUST 31ST, 2018."

09:37AM 2 THAT EXACT SAME STATEMENT IS TRUE OF MR. BALWANI. I KNOW

09:37AM 3 THAT THE DEFENSE DOESN'T WANT TO ADMIT THAT, BUT IT IS TRUE

09:37AM 4 THAT MR. BALWANI ALSO COULD HAVE OBTAINED THAT MATERIAL IF IT

09:37AM 5 WERE, IN FACT, POSSIBLE.

09:37AM 6 THE COURT: YOU'RE NOT GOING TO ASK HIM THAT, ARE

09:37AM 7 YOU?

09:37AM 8 MR. BRECHER: WELL, YOUR HONOR, WE ARE GOING TO ASK

09:37AM 9 HIM OR WE DO INTEND TO ASK HIM, WAS THE GOVERNMENT TOLD THAT

09:37AM 10 THIS IS SOMETHING THAT THEY COULD HAVE DONE?

09:38AM 11 YES.

09:38AM 12 WOULD THAT HAVE WORKED?

09:38AM 13 YES.

09:38AM 14 I DON'T KNOW IF THAT'S THE SAME THING, BUT I THINK THAT

09:38AM 15 THAT'S EXACTLY AS YOUR HONOR HAS ARTICULATED A FEW MINUTES AGO.

09:38AM 16 THE COURT: WELL, IN HIS OPINION, IT COULD HAVE BEEN

09:38AM 17 RECONSTRUCTED, WHATEVER THE TERM IS.

09:38AM 18 MR. BRECHER: YES. ALTHOUGH, I DO NEED TO PAUSE --

09:38AM 19 WELL, I APOLOGIZE. I SHOULD ALLOW MS. VOLKAR TO FINISH.

09:38AM 20 MS. VOLKAR: I COULD GO ON, YOUR HONOR, BUT THE

09:38AM 21 ANSWER IS THAT THE DEFENSE DOES INTEND TO GO THERE.

09:38AM 22 AND MR. SONNIER IS NOT QUALIFIED. THEY ARE TRYING TO

09:38AM 23 START A MINI TRIAL, BUT THEY WANT TO START A MINI TRIAL AND TIE

09:38AM 24 THE GOVERNMENT'S HANDS BEHIND THEIR BACK.

09:38AM 25 WHEN THEY SAY THINGS LIKE, "WE SHOULD BE ALLOWED TO

09:38AM 1 INTRODUCE THIS EVIDENCE AND HAVE SOMEONE SIT ON THE STAND AND

09:38AM 2 SAY THE GOVERNMENT SHOULD HAVE DONE X, BUT IN RESPONSE, THE

09:38AM 3 GOVERNMENT SHOULDN'T BE ALLOWED TO PUT IN THEIR REBUTTAL CASE

09:38AM 4 THE FACT THAT MR. BALWANI ALSO COULD HAVE DONE X."

09:38AM 5 THAT IS A LOPSIDED, UNTRUE VERSION OF THE FACTS.

09:38AM 6 AGAIN, THE PARTIES HOTLY CONTEST THE FACTS. I WANT TO GO

09:39AM 7 BACK TO THE LEGAL DETERMINATION OF RELEVANCE AND WHAT DOES IT

09:39AM 8 HAVE TO DO WITH THE CURRENT CHARGES.

09:39AM 9 MR. BALWANI WAS INDICTED BEFORE THE GOVERNMENT GOT THIS

09:39AM 10 NON-WORKING COPYING OF THE LIS.

09:39AM 11 PART OF THE REASON WHY THE COURT FOUND THE

09:39AM 12 POST-AUGUST 31ST, 2018 CONDUCT TO BE IRRELEVANT IS BECAUSE IT'S

09:39AM 13 BEEN THE GOVERNMENT'S POSITION ALL ALONG, WE DIDN'T NEED IT TO

09:39AM 14 PROSECUTE HIM. DID WE TRY TO GET IT? YES, FOR YEARS THE

09:39AM 15 GOVERNMENT TRIED TO GET IT. BUT WERE WE SUCCESSFUL? NO. DID

09:39AM 16 WE NEED TO TO PROSECUTE HIM? NO.

09:39AM 17 WHY IS THAT? BECAUSE WE HAD DR. DAS, AND WE HAD THE FACT

09:39AM 18 THAT THEY VOIDED ALL OF THE TESTS ON THEIR PROPRIETARY DEVICE,

09:39AM 19 THE EDISON.

09:39AM 20 WE HAVE THE CMS REPORT AND SARAH BENNETT. WE HAVE ALL OF

09:39AM 21 THESE OTHER INDICATIONS THAT WE CAN USE TO PROVE THE WIRE FRAUD

09:39AM 22 COUNTS.

09:39AM 23 AND WE HAD REAMS OF DATA THAT WERE PROVIDED TO US FROM THE

09:39AM 24 LIS, AND, IN FACT, THAT'S WHAT THE LAWYERS AT WILMER HALE TOLD

09:40AM 25 US WHEN THEY SAID WE DIDN'T NEED THE FULL LIS.

09:40AM 1 SO, YES, THERE IS A LOPSIDED STORY THAT IS GOING ON HERE.

09:40AM 2 AND WE ARE SAYING THAT IF THEY'RE GOING TO PUT IN ONE VIEW OF

09:40AM 3 IT, THE GOVERNMENT GETS TO EXPLAIN WHY IT DID DO A THOROUGH

09:40AM 4 INVESTIGATION, AND THAT'S GOING TO BE A LOT OF EVIDENCE THAT

09:40AM 5 MR. BALWANI HAS TRIED TO KEEP OUT OF THIS TRIAL.

09:40AM 6 MR. BRECHER: SO, YOUR HONOR, THAT'S SIMPLY NOT

09:40AM 7 TRUE. AND I'LL START WITH --

09:40AM 8 THE COURT: WHICH PART OF MS. VOLKAR'S STATEMENT?

09:40AM 9 MR. BRECHER: ALMOST ALL OF IT.

09:40AM 10 LET ME START WITH THE CLAIM THAT MR. BALWANI HAD THE SAME

09:40AM 11 OPPORTUNITIES.

09:40AM 12 I DON'T KNOW WHERE THAT COMES FROM, YOUR HONOR, BUT

09:40AM 13 MR. BALWANI HAD NO CONTROL OVER THERANOS WHEN IT DISASSEMBLED

09:40AM 14 THIS MACHINERY. MR. BALWANI DIDN'T RECEIVE A WARNING FROM AN

09:40AM 15 LIS SUPERVISOR SAYING, HEY, YOU SHOULD HAVE GOTTEN THE SERVERS.

09:40AM 16 THE GOVERNMENT DID.

09:40AM 17 THERE'S APPARENTLY A SERIOUS DISPUTES, OR PURPORTEDLY

09:40AM 18 SERIOUS DISPUTE, OVER WHETHER THE GOVERNMENT HAD THE POWER TO

09:40AM 19 SEIZE SERVERS.

09:41AM 20 THE GOVERNMENT HAS AN FBI AND A POSTAL INSPECTION SERVICE,

09:41AM 21 AND THEY HAVE TRUCKS, AND THEY CAN GET SEIZURE WARRANTS.

09:41AM 22 WHEN MR. BALWANI GOES IN, THAT'S CALLED THEFT. SO IT'S A

09:41AM 23 COMPLETELY DIFFERENT SITUATION.

09:41AM 24 LET'S SEE. THE MOTION TO SUPPRESS HEARING WAS ALL ABOUT

09:41AM 25 THE PRE-AUGUST 2018 COMMENT. I IMAGINE THAT'S A REFERENCE TO

09:41AM 1 THE MOTION TO SUPPRESS HEARING IN THE HOLMES CASE, BECAUSE AS I
09:41AM 2 RECALL AND I THINK YOUR HONOR WILL RECALL, OUR HEARING IN THIS
09:41AM 3 CASE ON FEBRUARY 8TH WAS ALL ABOUT WHAT MR. SONNIER SAID COULD
09:41AM 4 HAVE HAPPENED AFTER AUGUST 30TH OF 2018. AND HE SAID, IF THE
09:41AM 5 GOVERNMENT WANTED IT, THEY COULD HAVE HAD IT. AND WE DON'T
09:41AM 6 HAVE IT.

09:41AM 7 WE NOW SEE -- WE'RE NOW HEARING STATEMENTS ABOUT ALL OF
09:41AM 8 THE THINGS THAT THE GOVERNMENT DID OR COULD HAVE DONE TO SHOW
09:41AM 9 THEIR GOOD FAITH AND THEIR COMPETENCE. THAT'S FINE. I THINK
09:41AM 10 WE ALREADY SAID THAT IF THEY WANT TO PUT IN THAT EVIDENCE,
09:41AM 11 THAT'S FINE.

09:41AM 12 WHAT THEY CAN'T DO IS SUGGEST THAT MR. BALWANI HAD CONTROL
09:42AM 13 OVER THESE MATTERS. THERE'S NO GOOD FAITH BASIS FOR THAT.
09:42AM 14 THERE'S NO EVIDENCE SUPPORTING THAT.

09:42AM 15 ALL OF THE EVIDENCE SUGGESTS THAT MR. BALWANI HIRED
09:42AM 16 SOMEONE TO TRY TO GET THIS COPYING. THAT SOMEONE WAS TOLD BY
09:42AM 17 ONE OF THE WITNESSES THAT THE GOVERNMENT APPARENTLY PLANS TO
09:42AM 18 CALL, I'VE GOT THE DIRECTORY IF YOU WANT. ALL CLEAR TO SHUT
09:42AM 19 DOWN.

09:42AM 20 AND WHAT WE REALLY NEED, YOUR HONOR, IS TO GO BACK TO
09:42AM 21 BASICS HERE ON WHAT THE RELEVANCE OF THIS EVIDENCE IS.

09:42AM 22 AND AGAIN, THIS IS WHAT TROUBLES ME, THE GOVERNMENT HAS
09:42AM 23 NOWHERE TRIED TO DEFEND OR EVEN EXPLAIN ITS ABRUPT ABOUT FACE
09:42AM 24 ABOUT THE NEEDING OF THIS EVIDENCE.

09:42AM 25 LAST YEAR, WHAT THEY WERE TELLING THIS COURT IN FILINGS

09:42AM 1 WAS, THE LIS PROVIDED THE TOOLS, QUOTE, "TO SEARCH FOR SUCH

09:42AM 2 CRITICAL EVIDENCE AS ALL THERANOS BLOOD TESTS WITH VALIDATION

09:42AM 3 ERRORS." THESE ARE THE GOVERNMENT'S WORDS. THIS IS DOCKET

09:43AM 4 669.

09:43AM 5 "THE LIS HAD IMMENSE FUNCTIONALITY." THE GOVERNMENT'S

09:43AM 6 WORDS.

09:43AM 7 "THE DATABASE WAS CUSTOM MADE AND THOSE WHO POSSESSED

09:43AM 8 BACKDOOR ACCESS TO THE SQL DATABASE COULD QUERY THE DATABASE TO

09:43AM 9 PRODUCE SOPHISTICATED RESULTS THAT EXPLAINED WHAT THE DATA

09:43AM 10 SHOWED ABOUT THERANOS'S CAPABILITIES." THE GOVERNMENT'S WORDS.

09:43AM 11 THE GOVERNMENT'S WORDS SAID THAT "THE LIS IS WHERE THE

09:43AM 12 METAPHORICAL BODIES WERE BURIED."

09:43AM 13 THE ONLY THING THAT CHANGED BETWEEN WHEN THEY WROTE THOSE

09:43AM 14 WORDS AND WHAT THEY'RE SAYING NOW, WHICH IS, OH, THE LIS, IT'S

09:43AM 15 NOTHING, IS OUR EXPERT WROTE A DECLARATION SAYING, BY THE WAY,

09:43AM 16 YOU GUYS COULD HAVE HAD THIS IF YOU WANTED IT.

09:43AM 17 NOW, SUDDENLY, THEY'VE DONE A COMPLETE 180 WITH NO

09:43AM 18 EXPLANATION WHATSOEVER. THEY SHOULD BE BOUNDS BY THOSE WORDS,

09:43AM 19 AND THEY SHOULD BE MADE TO EAT THOSE WORDS. AND I'VE SEEN NO

09:43AM 20 EXPLANATION, OR EVEN ACKNOWLEDGEMENT, THAT THESE ARE THE THINGS

09:43AM 21 THAT THE GOVERNMENT WAS CLAIMING.

09:43AM 22 THAT IS WHAT WE ARE SAYING HERE, YOUR HONOR.

09:43AM 23 THIS IS IMPORTANT EVIDENCE. WE HAVE ALREADY LAID THE

09:44AM 24 FOUNDATION, ALL OF THE FOUNDATION THAT WE INTEND TO LAY TO MAKE

09:44AM 25 THAT POINT, AND WE ALSO INTEND TO HAVE AN EXPERT SAY, THE

09:44AM 1 GOVERNMENT WAS ADVISED OF A WAY TO SECURE THAT EVIDENCE AND IT
09:44AM 2 DIDN'T GO THAT ROUTE. THAT'S IT.

09:44AM 3 MS. VOLKAR: I'M HAPPY TO RESPOND TO THAT,
09:44AM 4 YOUR HONOR.

09:44AM 5 THE COURT: GO AHEAD.

09:44AM 6 MS. VOLKAR: I'LL JUST SAY THAT THE SAME PLEADING
09:44AM 7 THAT MR. BRECHER POINTS TO, AND THE COURT CAN READ IT, IS
09:44AM 8 EXACTLY WHY THE GOVERNMENT IS SO UPSET THAT THERANOS DESTROYED
09:44AM 9 IT AND DIDN'T TELL THE GOVERNMENT THAT IT DIDN'T GIVE IT A
09:44AM 10 WORKING COPY.

09:44AM 11 IT IS -- THERE WAS A LARGE TROVE OF DATA IN THERE, AND
09:44AM 12 THAT'S WHY WE'VE REQUESTED IT FOR THREE YEARS. I DON'T BELIEVE
09:44AM 13 I'VE SAID ANYTHING DIFFERENTLY THIS MORNING.

09:44AM 14 WE'VE ALSO SAID IN THAT EXACT SAME FILING THAT THE OTHER
09:44AM 15 EVIDENCE THAT WAS THE SUBJECT OF MS. HOLMES'S MOTION TO
09:44AM 16 SUPPRESS, MR. BALWANI ADOPTED IT, WAS ALL OF THE OTHER EVIDENCE
09:44AM 17 THAT THE GOVERNMENT HAD TO CONTINUE FORWARD WITH THIS
09:44AM 18 PROSECUTION.

09:44AM 19 IF THE DATABASE WAS THE END ALL BE ALL, WHICH THE
09:44AM 20 GOVERNMENT NEVER SAID EVEN IN THAT PRIOR PLEADING, THEN THE
09:45AM 21 GOVERNMENT WOULDN'T HAVE BEEN ABLE TO GO FORWARD WITH THE
09:45AM 22 PROSECUTION. IT DOESN'T MAKE ANY SENSE.

09:45AM 23 SO I JUST HAVE TO POINT OUT THAT, WHAT I THOUGHT WAS AN
09:45AM 24 OBVIOUS POINT.

09:45AM 25 AND THEN THE LAST THING I WANT TO SAY IS, MR. BRECHER GOES

09:45AM 1 BACK TO, WELL, THE GOVERNMENT HAS THE FBI, THE GOVERNMENT HAS,
09:45AM 2 AS MR. SONNIER SAYS IN HIS DECLARATION, COERCIVE METHODS THAT
09:45AM 3 THEY COULD USE TO OBTAIN THE SERVERS, AND MR. BALWANI DOESN'T
09:45AM 4 HAVE THOSE.

09:45AM 5 YOUR HONOR, DOES THAT REALLY HAVE PLACE IN THIS TRIAL,
09:45AM 6 "THE GOVERNMENT HAS COERCIVE METHODS"? AND WHY IS MR. SONNIER
09:45AM 7 QUALIFIED TO TALK ABOUT THAT?

09:45AM 8 AGAIN, THEY SAID HE'S NOT BEING OFFERED AS A FORENSIC
09:45AM 9 EXPERT. THAT MEANS THAT WHAT THEY REALLY WANT OUT OF HIM IS
09:45AM 10 BEYOND HIS EXPERTISE. IT'S NOT RELIABLE. THAT BRINGS 702
09:45AM 11 CONCERNS.

09:45AM 12 AND AGAIN, JUST GOING BACK TO BASIC RELEVANCE, IT'S ALL AT
09:45AM 13 A TIME PERIOD THAT IS PAST ANY TIME PERIOD THAT MATTERS, EVEN
09:45AM 14 WITH RESPECT TO THE THOROUGHNESS OF THE INVESTIGATION.

09:46AM 15 IF WE WANT TO BE REALLY BASIC, THE INVESTIGATION UP UNTIL
09:46AM 16 THE INDICTMENT, LED TO THE INDICTMENT WITHOUT THE LIS.

09:46AM 17 SO, AGAIN, I JUST THINK IT HAS NO -- AND THERE ARE A LOT
09:46AM 18 MORE REASONS THAT ARE STATED IN MY BRIEF, BUT IT JUST HAS
09:46AM 19 NOTHING TO DO WITH THE THOROUGHNESS OF THE INVESTIGATION AND
09:46AM 20 IT'S FAR AFIELD FROM THE CASES THEY CITE.

09:46AM 21 MR. BRECHER: SO, YOUR HONOR, THE GOVERNMENT IS
09:46AM 22 APPARENTLY NOW MOVING FROM THERE'S A FACTUAL DISPUTE ABOUT
09:46AM 23 WHETHER WE COULD HAVE DONE TO, WELL, MR. SONNIER IS NOT
09:46AM 24 QUALIFIED TO OPINE ON WHETHER WE COULD HAVE DONE IT.

09:46AM 25 I DON'T THINK THERE'S A SERIOUS QUESTION THAT THE

09:46AM 1 GOVERNMENT DOES HAVE COERCIVE METHODS TO OBTAIN INFORMATION,

09:46AM 2 BUT WE DON'T NEED TO DO WITH OUR EXPERT.

09:46AM 3 I HAVE ALREADY TOLD THE COURT WHAT WE INTEND TO SAY --

09:46AM 4 THE COURT: WELL, YOU PUT IT IN YOUR PLEADINGS, AND,

09:46AM 5 OF COURSE, IT DRAWS EVERYONE'S ATTENTION, INCLUDING MINE. AND

09:46AM 6 I SAID, OKAY, THEY WANT TO PUT HIM ON TO TALK ABOUT THE

09:46AM 7 GOVERNMENT COULD HAVE GOT AN ARMORED VEHICLE AND CRAMMED

09:46AM 8 THROUGH THE DOOR, OR SOMETHING. THEY HAVE BIG GOONS WHO CAN

09:46AM 9 COME OUT AND LOCK STEP THEIR WAY THROUGH THINGS. YOU'RE NOT

09:46AM 10 GOING TO DO THAT.

09:46AM 11 MR. BRECHER: WE'RE NOT GOING TO DO THAT,

09:46AM 12 YOUR HONOR. AND CERTAINLY NOTHING IN OUR PLEADINGS SUGGEST

09:47AM 13 ANYTHING ABOUT BIG GOONS OR KNOCKING DOWN DOORS.

09:47AM 14 THE COURT: NO, THAT'S MY WORDS.

09:47AM 15 BUT COERCIVE IS SOMETHING THAT -- YOU WANT THIS WITNESS TO

09:47AM 16 TESTIFY ABOUT COERCIVE TACTICS? I'M JUST -- I DON'T THINK

09:47AM 17 YOU'RE GOING TO DO THAT. THE COURT IS NOT GOING TO PERMIT YOU

09:47AM 18 TO DO THAT. AND I DON'T THINK IT WAS YOUR INTENT. IF THIS

09:47AM 19 WITNESS WAS GOING TO TESTIFY, HE'S NOT GOING TO TALK ABOUT

09:47AM 20 THAT.

09:47AM 21 MR. BRECHER: THAT'S CORRECT, YOUR HONOR, AND THAT'S

09:47AM 22 NOT CONSISTENT WITH THE REPRESENTATION THAT I MADE TODAY.

09:47AM 23 SECOND, YOUR HONOR, WE ALSO HAVE AMPLE MEANS TO GET THIS

09:47AM 24 EVIDENCE IN IF WE CAN SEE THOSE EMAILS, WHICH ARE BRADY, AND

09:47AM 25 THE SUBJECT OF A PENDING MOTION.

09:47AM 1 THE COURT: AND YOU WOULD GET THOSE IN HOW?

09:47AM 2 MR. BRECHER: YOUR HONOR, THAT WOULD BE EVEN EASIER

09:47AM 3 THROUGH MR. SONNIER, BECAUSE THEY'RE STATEMENTS BY GOVERNMENT

09:47AM 4 EMPLOYEES WITHIN THE SCOPE OF THEIR DUTIES. SO THEY'RE

09:47AM 5 NONHEARSAY. THEY'RE AUTHENTIC BY DINT OF BEING PRODUCED BY THE

09:47AM 6 OTHER PARTY. THERE IS CASE LAW TO THAT EFFECT. WE ARE HAPPY

09:47AM 7 TO PROVIDE IT.

09:47AM 8 THE COURT: SO WHAT YOU WOULD DO IS SHOW HIM THESE

09:47AM 9 DOCUMENTS, IS THAT WHAT YOU WOULD DO?

09:47AM 10 MR. BRECHER: AS I SAID, YOUR HONOR, WE'RE HAPPY TO

09:48AM 11 USE THE BRADY LETTER, BUT WE THINK IT'S CRITICAL IN ORDER TO

09:48AM 12 FULLY ASSESS AND BOTH WHERE WE WANT TO GO WITH THIS DEFENSE TO

09:48AM 13 SEE THE UNDERLYING DOCUMENTS, NOT THE GOVERNMENT'S SANITIZED

09:48AM 14 VERSION OF THEM.

09:48AM 15 I DON'T WANT TO RELITIGATE THE ARGUMENT THAT MS. VOLKAR

09:48AM 16 AND MR. COOPERSMITH HAD THE OTHER DAY BECAUSE I KNOW WE HAVE

09:48AM 17 OTHER ISSUES TO DEAL WITH.

09:48AM 18 THE COURT: NO.

09:48AM 19 MR. BRECHER: BUT I DO THINK THAT SEEING THOSE

09:48AM 20 DOCUMENTS IS ABSOLUTELY CRITICAL.

09:48AM 21 THE COURT: LET ME ASK YOU THIS, WE'VE BEEN TALKING

09:48AM 22 ABOUT THIS NOW FOR ABOUT 80 MINUTES OR SO, SOMETHING LIKE THAT.

09:48AM 23 WHAT ABOUT 403? THIS SOUNDS LIKE WE ARE HAVING A LITTLE

09:48AM 24 MINI TRIAL. YOU'RE GOING TO HAVE WITNESSES? IT'S A TENNIS

09:48AM 25 MATCH, ISN'T IT? THE BALL IS GOING BACK AND HOW MANY SETS ARE

09:48AM 1 WE GOING TO ENGAGE IN HERE? IT'S GOING TO EXTEND THE TRIAL.

09:48AM 2 AND YOU'RE GOING TO PUT THIS ON, AS YOU'VE SAID, AND

09:48AM 3 YOU'VE VERY KINDLY SAID, WELL, WE WELCOME THE GOVERNMENT

09:48AM 4 REHABILITATING THEMSELVES. AND THEY'LL PUT THEIR WITNESSES ON.

09:49AM 5 AND THEN YOU MIGHT HAVE SURREBUTTAL OR SOMETHING. I DON'T

09:49AM 6 KNOW.

09:49AM 7 MR. BRECHER: YOUR HONOR, THE AVAILABILITY, THE

09:49AM 8 UNAVAILABILITY, THE LOSS AND THE REASONS FOR THE LOSS OF

09:49AM 9 EVIDENCE THAT, AS BOTH SIDES HAVE ACKNOWLEDGED, IS CRITICAL

09:49AM 10 EVIDENCE, THAT'S NOT A MINI TRIAL. THAT IS THE TRIAL. THAT IS

09:49AM 11 PRECISELY WHAT THE SIXTH AMENDMENT GIVES MR. BALWANI THE RIGHT

09:49AM 12 TO RAISE.

09:49AM 13 AND THE IDEA THAT THE GOVERNMENT COULD TRY TO HOLD THAT

09:49AM 14 RIGHT HOSTAGE BY SAYING, IF YOU PUT ON THIS ONE TECHNICAL

09:49AM 15 EXPERT WHO IS SIMPLY GOING TO SAY, WELL, YOU KNOW, THE

09:49AM 16 GOVERNMENT WAS ADVISED THAT THEY COULD HAVE DONE THIS, AND THAT

09:49AM 17 WOULD HAVE WORKED. AND SAY IN RESPONSE, WE NEED TO CALL NINE

09:49AM 18 EXPERTS OR NINE WITNESSES AND RAISE FIVE OR SIX DIFFERENT

09:49AM 19 AREAS --

09:49AM 20 THE COURT: WELL, LET'S BE FAIR, THOUGH. YOU USED

09:49AM 21 THE WORD "COERCIVE" AND HE TESTIFIED IN "COERCIVE" IN YOUR

09:49AM 22 PLEADINGS. AND MS. VOLKAR RESPONDS IN KIND. THIS IS THE

09:49AM 23 TENNIS MATCH WE'RE TALKING ABOUT.

09:49AM 24 BUT I UNDERSTAND. YOU KNOW, IT'S NOT HYPERBOLE, BUT IT'S

09:49AM 25 PLEADINGS, AND I GET THAT.

09:49AM 1 I'M TRYING TO GET US BACK TO REALITY HERE ABOUT IF THE
09:50AM 2 COURT RECOGNIZES THAT THE DEFENSE HAS AN OPPORTUNITY TO
09:50AM 3 CHALLENGE, TO QUESTION THE GOVERNMENT'S CASE, FIRST OF ALL, I
09:50AM 4 THINK YOU HAVE AN OPPORTUNITY TO DO THAT NOW. YOU HAVE ENOUGH
09:50AM 5 TO DO THAT NOW.

09:50AM 6 MR. BRECHER: WE DO -- I'M SORRY, YOUR HONOR.

09:50AM 7 THE COURT: YOU DO, YOU HAVE ENOUGH TO DO THAT NOW.

09:50AM 8 THE QUESTION IS, IS THIS SOMETHING THAT IS CRITICAL FOR
09:50AM 9 YOUR DEFENSE ALSO?

09:50AM 10 I LOOK AT IT AND I SEE, WELL, IT WOULD CERTAINLY BENEFIT
09:50AM 11 AND HELP YOU.

09:50AM 12 OR IS IT, IS IT REALLY TRYING TO SULLY THE GOVERNMENT AND
09:50AM 13 THROW MUD ON THEM, EITHER PERSONALLY OR IN SOME WAY SULLY THEM
09:50AM 14 THAT IS NOT RELEVANT, THAT IS SOMEWHAT TANGENTIALLY RELEVANT?

09:50AM 15 AND IF WE'RE GOING TO GET INTO MUD SLINGING, YOU KNOW, BE
09:50AM 16 CAREFUL.

09:50AM 17 MR. BRECHER: SO, YOUR HONOR, I'M FULLY COGNIZANT
09:50AM 18 ABOUT THAT. I WILL SIMPLY SAY THAT AS FOR WHATEVER MUD IS
09:50AM 19 FLOWING IN THE DIRECTION OF THERANOS AND WILMER HALE, MY CLIENT
09:51AM 20 WAS NOT AT THERANOS AT THE TIME AND WILMER HALE DID NOT GIVE ME
09:51AM 21 A CALL BACK ALL OF THOSE YEARS AGO, SO I'M CONCERNED BY IT.

09:51AM 22 THE COURT: OKAY.

09:51AM 23 MR. BRECHER: BUT THE REAL ISSUE IS WHAT ARE WE
09:51AM 24 ALLOWED TO DO UNDER BINDING SUPREME COURT AND NINTH CIRCUIT
09:51AM 25 LAW?

09:51AM 1 AND WE ARE ALLOWED TO SAY, AND LAY THE EVIDENTIARY
09:51AM 2 FOUNDATION THROUGH TESTIMONY, AND THEN ARGUE TO THE JURY, YOU
09:51AM 3 KNOW WHAT, MEMBERS OF THE JURY, THE GOVERNMENT COULD HAVE DONE
09:51AM 4 MORE, AND FROM THAT, YOU SHOULD HAVE DOUBTS ABOUT THEIR
09:51AM 5 INVESTIGATION. THAT IS ALLOWED.

09:51AM 6 THIS COURT HAS NEVER CAST DOUBT UPON THAT. YOU ACTUALLY
09:51AM 7 STATED THAT TWICE IN YOUR RULINGS -- THREE TIMES IF YOU COUNT
09:51AM 8 THE HOLMES RULINGS. YOU EVEN, AS YOUR HONOR WILL RECALL,
09:51AM 9 RESERVED THE QUESTION OF WHETHER WE MAY BE ENTITLED TO AN
09:51AM 10 ADVERSE INFERENCE INSTRUCTION.

09:51AM 11 I DON'T KNOW HOW WE WOULD LAY THE FOUNDATION FOR SUCH AN
09:51AM 12 INSTRUCTION WITHOUT THE ABILITY TO PUT ON THIS EVIDENCE WHICH
09:51AM 13 BINDING LAW GIVES US THE RIGHT TO PUT ON.

09:51AM 14 THE COURT: AND JUST BECAUSE I USED THOSE WORDS,
09:51AM 15 THEY'RE NOT TALISMANIC. YOU SHOULDN'T THINK THAT, OH, HE'S
09:51AM 16 ALREADY GOING TO DO THIS.

09:51AM 17 MR. BRECHER: I DON'T TAKE IT THAT WAY, YOUR HONOR.
09:51AM 18 BUT EVEN PUTTING ASIDE THE COURT'S WORDS, I THINK WHAT MATTERS
09:52AM 19 ARE THE WORDS OF THE NINTH CIRCUIT AND THE WORDS OF THE SUPREME
09:52AM 20 COURT.

09:52AM 21 AND I WANT TO COMMENT FOR A MOMENT ABOUT SULLYING THE
09:52AM 22 GOVERNMENT OR THROWING MUD ON THE GOVERNMENT.

09:52AM 23 THE COURT: RIGHT.

09:52AM 24 MR. BRECHER: BUT MY INTENTION ISN'T TO INSULT AND
09:52AM 25 OUR INTENTION IS NOT TO INSULT THESE PROSECUTORS OR THESE

09:52AM 1 INVESTIGATORS, BUT THAT'S NOT THE NATURE OF QUESTIONING THE
09:52AM 2 FAIRNESS OR THE INTEGRITY OR THE THOROUGHNESS OF AN
09:52AM 3 INVESTIGATION, SOMETHING THAT THE DEFENDANT IS ENTITLED TO DO.
09:52AM 4 WE LIVE IN A LEGAL SYSTEM IN WHICH AS THE COURT KNOWS ALL
09:52AM 5 TOO WELL FROM OUR BIVENS JURISPRUDENCE, FEDERAL PROSECUTORS AND
09:52AM 6 FEDERAL LAW ENFORCEMENT AGENTS ARE, IN GENERAL, ALLOWED TO RUN
09:52AM 7 ROUGHSHOD OVER OUR CONSTITUTIONAL RIGHTS WITH NO CONSEQUENCES,
09:52AM 8 NO ACCOUNTABILITY. THAT'S NOT WHAT I'M HERE TO TALK ABOUT
09:52AM 9 TODAY.
09:52AM 10 BUT WHAT WE'RE BEING TOLD TODAY IS BEYOND -- APPARENTLY,
09:52AM 11 THAT LAW-FREE ZONE ISN'T ENOUGH FOR THE GOVERNMENT.
09:52AM 12 APPARENTLY, WHAT THEY ALSO NEED IS A WORLD IN WHICH A CRIMINAL
09:52AM 13 DEFENDANT, WHOSE LIBERTY IS AT STAKE, CAN'T CRITICIZE THE
09:52AM 14 INVESTIGATION AND SAY YOU COULD HAVE DONE MORE, AND I'VE GOT AN
09:52AM 15 EXPERT WHO IS HERE TO TELL YOU THAT YOU COULD HAVE DONE MORE.
09:53AM 16 AND THAT IS NOT CONSISTENT WITH THE SIXTH AMENDMENT. THAT
09:53AM 17 WOULD FUNDAMENTALLY IMPAIR MR. BALWANI'S SIXTH AMENDMENT
09:53AM 18 RIGHTS.
09:53AM 19 THE COURT: OKAY.
09:53AM 20 MS. VOLKAR: AGAIN, YOUR HONOR, THIS EXPERT IS NOT
09:53AM 21 QUALIFIED TO GIVE THAT OPINION. I DON'T KNOW -- AND THEN WE'RE
09:53AM 22 REALLY SQUARELY IN RULE 702 LAND, AND MAYBE WE NEED TO WRITE A
09:53AM 23 FURTHER DAUBERT BRIEFING ON THAT, IF NECESSARY.
09:53AM 24 BUT THIS EXPERT IS NOT QUALIFIED TO MAKE THAT ASSERTION
09:53AM 25 THAT MR. BRECHER JUST SAID. I THINK THAT'S REALLY BASIC. AND,

09:53AM 1 AGAIN, IT'S ENTIRELY IRRELEVANT AND DURING A RELEVANT TIME
09:53AM 2 PERIOD.

09:53AM 3 I WANT TO GO BACK TO JUST -- MY TEAMMATE REMINDED ME THAT
09:53AM 4 PART OF THE REASON WHY WE REFERENCED THE PRIOR LITIGATION, AND
09:53AM 5 YOU HEARD MR. LEACH SAY THIS EARLIER THIS WEEK, OR LAST WEEK,
09:53AM 6 WE DIDN'T WANT TO GET INTO THE PRIOR LITIGATION. WE UNDERSTAND
09:53AM 7 YOUR HONOR'S RULINGS.

09:53AM 8 BUT IN THAT PRIOR LITIGATION, MR. BALWANI WAS A DEFENDANT
09:53AM 9 FOR MANY YEARS AND HAD ALL OF THE TOOLS OF CIVIL DISCOVERY AT
09:54AM 10 HIS DISPOSAL THROUGHOUT THE PFM INVESTIGATION, THE ARIZONA
09:54AM 11 CONSUMER LITIGATION.

09:54AM 12 DURING THIS SAME TIME PERIOD THAT THE GOVERNMENT WAS
09:54AM 13 SENDING HIM SUBPOENAS, HE ALSO HAD A PERSONAL REASON TO GET
09:54AM 14 ACCESS TO, TO GET A FUNCTIONAL COPY OF THE LIS DATABASE, AND HE
09:54AM 15 ALSO HAD RULE 17 SUBPOENA POWERS IN THIS CASE WHEN HE KNEW HE
09:54AM 16 WAS UNDER INDICTMENT, WHICH IS, AGAIN, IS BEFORE THE DATABASE
09:54AM 17 GOES AWAY.

09:54AM 18 SO EVEN THOUGH THEY WANT TO DISTANCE ALL OF THAT STUFF,
09:54AM 19 THAT IS ALSO PART OF THE STORY OR COULD BE BECAUSE HE DID HAVE,
09:54AM 20 IF ANYTHING, MORE MOTIVE THAN THE GOVERNMENT TO GET ACCESS TO
09:54AM 21 THAT LIS DATABASE, IF IT ACTUALLY HAD EXONERATORY EVIDENCE IN
09:54AM 22 IT, WHICH I KNOW IS ANOTHER DEBATE.

09:54AM 23 AND THE LAST THING I WANT TO SAY IS THAT I THINK THE COURT
09:54AM 24 GETS THAT THIS IS REALLY -- IT IS A MUD SLINGING CONTEST. AND
09:54AM 25 THE DEFENDANT WANTS TO SAY I DID BAD THINGS, AND LIED TO

09:54AM 1 PEOPLE, AND I GOT THEIR MONEY FOR IT, AND I WANT TO SHOW THAT
09:54AM 2 THE GOVERNMENT IS BAD, TOO, BECAUSE THEY COULD HAVE GOTTEN THIS
09:55AM 3 EVIDENCE THAT IS OF QUESTIONABLE USEFULNESS. I MEAN, AGAIN, I
09:55AM 4 KNOW IT HAD PATIENT RESULTS AND DATA IN IT. BUT WOULD IT HAVE
09:55AM 5 ACTUALLY HAD SOMETHING MORE BENEFICIAL THAN WHAT WE HAVE SEEN
09:55AM 6 IN THIS TRIAL? THAT IS STILL AN OPEN QUESTION, AND NO ONE WILL
09:55AM 7 KNOW THE ANSWER BECAUSE IT'S PERMANENTLY DESTROYED.

09:55AM 8 MR. BRECHER: BRIEFLY, YOUR HONOR.

09:55AM 9 FIRST, THE NOTION THAT THE DEFENDANT WANTS TO SHOW
09:55AM 10 SOMETHING BECAUSE HE WANTS TO SAY TO THE JURY, I LIED TO PEOPLE
09:55AM 11 AND GOT THEIR MONEY FOR IT, I WON'T DIGNIFY THAT WITH A
09:55AM 12 RESPONSE. I DON'T THINK THAT IS GOING TO FEATURE PROMINENTLY
09:55AM 13 IN OUR CLOSING ARGUMENT.

09:55AM 14 SECOND, THE POINT ABOUT CIVIL LITIGATION, THERE'S A
09:55AM 15 DIFFERENCE HERE, YOUR HONOR. MR. BALWANI WAS NOT ADVISED ABOUT
09:55AM 16 AN ALTERNATIVE WAY OF SECURING THIS DATA. THE GOVERNMENT WAS,
09:55AM 17 AND THAT IS PRECISELY WHAT MR. SONNIER IS GOING TO TESTIFY
09:55AM 18 ABOUT IF SO PERMITTED.

09:55AM 19 LAST, I WANT TO SPEAK TO -- SECOND TO LAST. I APOLOGIZE.
09:55AM 20 I WANT TO TALK ABOUT DISCOVERY FOR A MOMENT BECAUSE THE
09:55AM 21 GOVERNMENT TEED IT UP, AND I THINK IT'S APPROPRIATE TO OFFER
09:55AM 22 SOME RESPONSE.

09:55AM 23 THE SCOPE OF ANY REBUTTAL BY THE GOVERNMENT. THE COURT
09:55AM 24 NOW KNOWS BASED ON THE EXTENSIVE, I THINK MORE EXTENSIVE
09:56AM 25 REPRESENTATIONS ABOUT THE COURSE OF DIRECT THAN CRIMINAL

09:56AM 1 DEFENDANTS USUALLY OFFER, PRECISELY WHAT MR. SONNIER IS GOING
09:56AM 2 TO SAY. IT DOESN'T ALWAYS RESEMBLE WHAT THE GOVERNMENT CLAIMS
09:56AM 3 HE'S GOING TO SAY, BUT THAT'S FINE.

09:56AM 4 WHAT IS FAIR REBUTTAL? IF THEY WANT TO CALL
09:56AM 5 MR. CADDENHEAD AND MR. CHUNG TO SAY, NO, YOU COULDN'T HAVE
09:56AM 6 REASSEMBLED THE DATA, THAT'S OKAY. THAT'S FINE.

09:56AM 7 IF THEY WANT TO CALL MR. CHANDRASEKARAN TO SAY THE SAME
09:56AM 8 THING, AND TO ADD THE FACT THAT MR. CHANDRASEKARAN ALSO
09:56AM 9 DESIGNED AND MAINTAINED THE DATABASE, SOMETHING THAT NEITHER
09:56AM 10 CADDENHEAD OR CHUNG CAN CLAIM, THAT'S FINE, AS LONG AS THERE'S
09:56AM 11 NO SUGGESTION THAT MR. BALWANI WAS SOMEHOW INVOLVED IN THE
09:56AM 12 DISASSEMBLY, WHICH AGAIN, THERE IS NO GOOD FAITH BASIS FOR THAT
09:56AM 13 INSINUATION, THAT'S FINE.

09:56AM 14 BUT A COUPLE OF THINGS THAT CAN'T HAPPEN. ONE, IS GETTING
09:56AM 15 INTO THE EXISTENCE OR LACK OF EXISTENCE OF JOINT DEFENSE
09:56AM 16 PRIVILEGES; GETTING INTO UNRELATED -- GETTING INTO RELATED
09:57AM 17 CIVIL LITIGATION FOR ALL OF THE 403 REASONS THAT YOUR HONOR
09:57AM 18 ALREADY IDENTIFIED DURING THE COLLOQUY THAT MS. WALSH HAD WITH
09:57AM 19 MR. LEACH LAST WEEK; AND MOST CRITICALLY REALLY, SANDBAGGING
09:57AM 20 THE DEFENSE WITH THIS IDEA THAT YOU'RE NOT GOING TO PUT IN
09:57AM 21 ANYTHING NEW, DEFENSE, ABOUT WHAT LIS WAS OR WHAT IT COULD DO,
09:57AM 22 BUT IF YOU SAY THE GOVERNMENT COULD HAVE HAD IT, WE'RE GOING TO
09:57AM 23 CALL A COUPLE OF EXPERT WITNESSES TO TELL YOU THAT THE PATIENT
09:57AM 24 TESTING RESULTS WERE SYSTEMATICALLY UNRELIABLE. THAT'S NOT
09:57AM 25 REBUTTAL, YOUR HONOR. THAT'S REPEATING PORTIONS OF THE

09:57AM 1 CASE-IN-CHIEF THAT THEY COULD HAVE PUT IN HAD THEY CHOSEN TO DO

09:57AM 2 SO, AND IT'S WAITING TO DO SO UNTIL THE CONTEXT OF WHICH

09:57AM 3 MR. BALWANI HAS NO CHANCE TO RESPOND. WE DON'T GET A

09:57AM 4 SURREBUTTAL CASE.

09:57AM 5 IT SIMPLY HAS NOTHING TO DO WITH MEETING THE ALLEGATIONS

09:57AM 6 AND THE TESTIMONY THAT WE EXPECT TO OFFER THROUGH MR. SONNIER.

09:57AM 7 AND WE HOPE THE COURT WILL PROVIDE US SOME CLARITY ON THAT

09:58AM 8 ISSUE.

09:58AM 9 LAST, YOUR HONOR --

09:58AM 10 THE COURT: WOULD THEY BE ABLE TO, THE GOVERNMENT,

09:58AM 11 BE ABLE TO PUT INTO EVIDENCE A SCENARIO OR FACTS SUCH THAT THEY

09:58AM 12 COULD RESPOND TO THE QUESTION, WHY DIDN'T THEY DO THIS? THEY

09:58AM 13 DIDN'T. THEY HAD THIS AND THEY COULD HAVE, MR. SONNIER WILL

09:58AM 14 SAY. AND, FOR EXAMPLE, WOULD THEY BE ABLE TO PUT SOMEBODY ON

09:58AM 15 TO SAY, WELL, WE DIDN'T DO IT BECAUSE THEY TOLD US WE HAD THE

09:58AM 16 REAL THING AND WE TRUSTED THAT?

09:58AM 17 MR. BRECHER: YES, THEY COULD DO THAT.

09:58AM 18 AND AGAIN, YOUR HONOR, AS I THOUGHT I SAID, WE PLANNED TO

09:58AM 19 INTRODUCE THAT CONTEXT THROUGH MR. SONNIER TO MAKE SURE THE

09:58AM 20 JURY KNOWS, YOU KNOW, THE BACKGROUND AGAINST WHICH WE'RE

09:58AM 21 OPERATING HERE.

09:58AM 22 THE COURT: OKAY.

09:58AM 23 MR. BRECHER: AND THE LAST POINT, YOUR HONOR, IS

09:58AM 24 THERE'S BEEN SOME DISCUSSIONS ABOUT DISCOVERY. THIS IS MAYBE

09:58AM 25 THE THIRD TIME IT'S BEEN ALLUDED TO AND IT'S COME UP A FEW

09:58AM 1 TIMES IN BRIEFS. I WANT TO MAKE SURE THAT WE'RE ON THE SAME
09:59AM 2 PAGE ABOUT THE DEFENDANT'S DISCOVERY OBLIGATIONS BECAUSE WE
09:59AM 3 BELIEVE WE HAVE MET THEM.

09:59AM 4 AND THE GOVERNMENT HASN'T REALLY ARTICULATED WHY THEY
09:59AM 5 THINK THEY'RE ENTITLED TO CERTAIN INFORMATION. THEY'VE MADE
09:59AM 6 SOME REFERENCES TO RULE 26.2. SO I JUST WANT TO DIVE --

09:59AM 7 THE COURT: FRIDAY WE TALKED, AND THERE WAS THIS
09:59AM 8 DISCUSSION, AND I ASKED YOU -- AND I THINK BOTH SIDES SAID
09:59AM 9 WE'LL TALK WITH THE GOVERNMENT, AND WE'LL GIVE THEM WHAT THEY
09:59AM 10 NEED. IT SEEMS LIKE THERE WAS AGREEMENT ON THAT, BUT
09:59AM 11 APPARENTLY NOT.

09:59AM 12 MR. BRECHER: WELL, YOUR HONOR, WE THINK WE HAVE
09:59AM 13 ALREADY COMPLIED WITH OUR DISCOVERY OBLIGATIONS. AND I JUST
09:59AM 14 WANT TO REMIND THE COURT THAT --

09:59AM 15 THE COURT: WELL, THEY SAID THEY DIDN'T GET
09:59AM 16 ANYTHING.

09:59AM 17 MR. BRECHER: FIRST OF ALL, THAT IS NOT TRUE. THE
09:59AM 18 GOVERNMENT HAS GOTTEN SOME MATERIAL.

09:59AM 19 MS. VOLKAR: WE GOT A SECRET SERVICE BEST PRACTICES
09:59AM 20 MANUAL.

09:59AM 21 MR. BRECHER: THEY GOT A LOT MORE THAN THAT,
09:59AM 22 YOUR HONOR. I THINK IT'S ABOUT A THOUSAND PAGES OF MATERIAL.

09:59AM 23 BUT PUTTING ASIDE THAT, THERE'S NOTHING IN RULE 26.2 THAT
09:59AM 24 ENTITLES THE GOVERNMENT TO WHAT I THINK THEY'RE ASKING FOR.

09:59AM 25 I WANT TO JUST REMIND THE COURT OF WHERE WE LANDED

09:59AM 1 PROCEDURALLY IN THE HOLMES TRIAL BECAUSE THIS WAS DISCUSSED

09:59AM 2 ABOUT THREE TIMES, AND YOUR HONOR NEVER RULED FOR THE

10:00AM 3 GOVERNMENT, AND THAT'S BECAUSE THE LANGUAGE OF THE RULE IS

10:00AM 4 QUITE CLEAR.

10:00AM 5 YOU MAY RECALL A COLLOQUY, THERE WERE SEVERAL, BUT THE ONE

10:00AM 6 THAT STICKS OUT MOST IN MY MIND IS THE ONE BETWEEN MR. LEACH

10:00AM 7 AND MS. SAHARIA.

10:00AM 8 THE GOVERNMENT SAID, YOUR HONOR, WE DON'T HAVE THEIR

10:00AM 9 INTERVIEW SUMMARIES OF THEIR WITNESSES.

10:00AM 10 AND MS. SAHARIA POINTED OUT THE LANGUAGE OF F.R.C.P. 26.2

10:00AM 11 AND SUBSECTION (F) LAYS OUT THE DEFINITION OF STATEMENTS UNDER

10:00AM 12 THAT RULE, AND IT INCLUDES STATEMENTS THAT ARE MADE, SIGNED OR

10:00AM 13 ADOPTED BY THE WITNESS, IT INCLUDES EITHER RECORDINGS OR

10:00AM 14 SUBSTANTIALLY VERBATIM TRANSCRIPTS OF WITNESS STATEMENTS, AND

10:00AM 15 IT INCLUDES GRAND JURY TESTIMONY, WHICH WE OBVIOUSLY WOULDN'T

10:00AM 16 HAVE ACCESS TO.

10:00AM 17 THERE'S NOTHING ABOUT THE DEFENDANT'S INTERVIEWS THAT

10:00AM 18 WOULD FALL INTO ANY OF THOSE CATEGORIES.

10:00AM 19 AND I THINK THAT WHEN THE GOVERNMENT WAS CONFRONTED WITH

10:00AM 20 THAT, THE RESPONSE WASN'T ANYTHING ABOUT THE LANGUAGE OF THE

10:00AM 21 RULE, THE RESPONSE WAS, WELL, YOUR HONOR, WE GIVE THEM OUR

10:01AM 22 302'S, AND IF WE DIDN'T, THE DEFENSE WOULD BE VERY UPSET.

10:01AM 23 AND TO THAT, I HAVE A COUPLE OF RESPONSES.

10:01AM 24 ONE, IS THAT THE GOVERNMENT DOES GIVE US THEIR 302'S, AND,

10:01AM 25 TWO, YES, IF THEY STOPPED, WE WOULD BE VERY UPSET.

10:01AM 1 BUT THE REASON THEY GIVE US THE 302'S IS NOT BECAUSE OF
10:01AM 2 RULE 26.2, IT'S BECAUSE OF RULE 16 AND BRADY. AND AS WE
10:01AM 3 POINTED OUT IN OPPOSITION TO THE GOVERNMENT'S MIL NUMBER 14,
10:01AM 4 AND AS THE COURT -- AS THE GOVERNMENT NEVER ACTUALLY RESPONDED
10:01AM 5 TO DURING THE ARGUMENT ON THAT MOTION, THE GOVERNMENT AND THE
10:01AM 6 DEFENSE HAVE RECIPROCAL DISCOVERY OBLIGATIONS, BUT THEY DON'T
10:01AM 7 HAVE IDENTICAL OBLIGATIONS.

10:01AM 8 THE DEFENSE'S OBLIGATION UNDER RULE 16 IS TO PRODUCE
10:01AM 9 MATERIALS THAT WE INTEND TO INTRODUCE IN OUR CASE-IN-CHIEF.

10:01AM 10 THE GOVERNMENT HAS THAT SAME OBLIGATION, BUT THEY ALSO
10:01AM 11 HAVE TO PROVIDE INFORMATION THAT IS MATERIAL TO PREPARING A
10:01AM 12 DEFENSE, WHICH I THINK 302'S WOULD QUITE EASILY FALL, AND THEY
10:01AM 13 HAVE INDEPENDENT CONSTITUTIONAL OBLIGATIONS UNDER GIGLIO AND
10:01AM 14 BRADY TO PROVIDE OTHER MATERIAL.

10:01AM 15 AND THERE IS ALSO THE OTHER PIECE THAT THE GOVERNMENT
10:01AM 16 HASN'T SEEMED TO HAVE RESPONDED TO, TO MY KNOWLEDGE, WHICH IS
10:02AM 17 RULE 16(B) (2) (B). I KNOW, THAT'S A LOT OF SUBSECTIONS.

10:02AM 18 BUT THE LANGUAGE THERE SAYS THAT STATEMENTS THAT ARE MADE
10:02AM 19 TO THE DEFENDANT OR A DEFENSE ATTORNEY ARE EXCLUDED FROM THOSE
10:02AM 20 STATEMENTS THAT HAVE TO BE INTRODUCED. AND I'M HAPPY TO GO
10:02AM 21 THROUGH IN DETAIL HOW THAT WORKS, BUT I JUST WANT TO RAISE THE
10:02AM 22 POINT THAT I THINK WE HAVE COMPLIED WITH OUR DISCOVERY
10:02AM 23 OBLIGATIONS.

10:02AM 24 THE COURT: OKAY. SO WHAT YOU'RE TELLING ME THIS
10:02AM 25 MORNING IS THAT YOU HAVE -- YOU'VE COMPLIED, YOU HAVE NOTHING

10:02AM 1 ELSE TO GIVE AS OF 10:00 A.M.?

10:02AM 2 MR. BRECHER: I'LL CHAT WITH MY TEAM, BUT YES.

10:02AM 3 THE COURT: OKAY. ALL RIGHT.

10:02AM 4 MS. VOLKAR: YOUR HONOR, I FIND THAT VERY HARD TO

10:02AM 5 BELIEVE FOR MANY REASONS, BUT THE MOST OBVIOUS ONE OF WHICH IS

10:02AM 6 THAT THE DEFENSE IDENTIFIED OR DISCLOSED THREE EXPERT

10:02AM 7 WITNESSES.

10:02AM 8 IN ONE, WE RECEIVED A DECLARATION FROM MR. SONNIER THAT

10:02AM 9 HAS HIS COMPENSATION LEVEL. WE HAVE NOT SEEN ANY CONTRACTS,

10:02AM 10 INVOICES, STATEMENTS THAT I WOULD EXPECT TO HAVE BEEN GENERATED

10:02AM 11 FOR THESE OTHER TWO RETAINED EXPERTS AT THE VERY LEAST, LET

10:03AM 12 ALONE STATEMENTS OF INTERVIEWS WITH THE DEFENDANTS.

10:03AM 13 AND WE KNOW, FOR EXAMPLE, THAT THEY MET WITH DR. WOOTEN.

10:03AM 14 WHAT WE DON'T KNOW IS WHETHER THEY WROTE ANYTHING DOWN. AND

10:03AM 15 THE PART THAT MR. BRECHER LEFT OUT FROM THE COLLOQUY WITH

10:03AM 16 MS. SAHARIA, WAS WHEN YOUR HONOR, I THINK CHUCKLING, SAID TO

10:03AM 17 MS. SAHARIA, I GUESS YOU CAN MEET WITH SOMEONE AND JUST NEVER

10:03AM 18 TAKE ANY NOTES AND NEVER WRITE ANYTHING DOWN, AND THAT'S ONE

10:03AM 19 WAY TO GET AROUND YOUR DISCOVERY OBLIGATIONS, AND CLEARLY THE

10:03AM 20 DEFENSE HAS PICKED UP ON THAT.

10:03AM 21 BUT REGARDLESS, WHATEVER DOES EXIST -- AND WE KNOW THEY

10:03AM 22 ARE MEETING WITH PEOPLE. I'M GLAD THAT THEY THINK THE

10:03AM 23 GOVERNMENT HAS BEEN OVERDISCLOSING AND MEETING OUR DISCOVERY

10:03AM 24 OBLIGATIONS TO THEM. WE UNDERSTAND THEM.

10:03AM 25 WE'RE JUST SAYING THAT, ESPECIALLY WHEN ON THE OTHER SIDE

10:03AM 1 THEY APPARENTLY THINK THAT THEY DON'T NEED TO SHARE -- I WAS
10:03AM 2 GOING TO SAY ANYTHING, BUT THEY DID, OF COURSE, PRODUCE A
10:03AM 3 THOUSAND PAGES OF SECRET SERVICE BEST PRACTICES MANUALS AND
10:03AM 4 SEVERAL OTHER GOVERNMENT MANUALS IN DISCOVERY. SO THEY DID
10:03AM 5 PRODUCE SOMETHING. I'M NOT SAYING THAT THEY DIDN'T PRODUCE
10:03AM 6 ANYTHING.

10:03AM 7 BUT TO SAY THAT THERE'S NO WRITTEN MATERIALS PARTICULARLY
10:03AM 8 FOR THOSE OTHER TWO DISCLOSED EXPERTS, I FIND VERY DIFFICULT TO
10:04AM 9 BELIEVE.

10:04AM 10 THE COURT: DO YOU WANT TO COMMENT ON THE EXPERTS?

10:04AM 11 MR. BRECHER: YES, VERY MUCH SO, YOUR HONOR.

10:04AM 12 FIRST OF ALL, CONTRACTS AND INVOICES ARE, SO FAR AS I CAN
10:04AM 13 TELL, NOT STATEMENTS UNDER RULE 26.2. I DON'T SEE HOW THEY
10:04AM 14 COULD BE.

10:04AM 15 WE KNOW WHAT THE WORD "STATEMENT" MEANS. IN THE CONTEXT
10:04AM 16 OF RULE 801, FOR EXAMPLE, IT EXPRESSLY EXCLUDES DOCUMENTS THAT
10:04AM 17 SET LEGAL OBLIGATIONS BETWEEN PARTIES. SO THAT WOULD INCLUDE
10:04AM 18 CONTRACTS.

10:04AM 19 WE ALSO KNOW IN THE CONTEXT OF RULE 16 WHAT A STATEMENT
10:04AM 20 IS. STATEMENTS EXPRESSLY EXCLUDE THINGS LIKE CONTRACT.
10:04AM 21 THERE'S CASE LAW TO THAT EFFECT.

10:04AM 22 I'M NOT AWARE OF ANY CASE LAW CONSTRUING RULE 26.2, AND I
10:04AM 23 DIDN'T HEAR MS. VOLKAR CITING ANY THAT SUGGEST THAT THEY FALL
10:04AM 24 WITHIN THE MEANING OF DISCLOSABLE MATERIALS.

10:04AM 25 WHAT I WILL SAY, YOUR HONOR, IS THAT I DON'T HAVE

10:04AM 1 PARTICULAR -- EXCUSE ME, I DON'T HAVE PARTICULAR HEARTBURN

10:04AM 2 ABOUT DISCLOSING CONTRACTS AND INVOICES IN ANY SORT OF INHERENT

10:04AM 3 WAY, BUT MY CONCERN IS TWOFOLD.

10:04AM 4 ONE, I DON'T THINK IT'S REQUIRED UNDER THE LANGUAGE OF THE

10:05AM 5 RULE OR ANY AUTHORITY CONSTRUING THE RULES. SO I DON'T KNOW

10:05AM 6 WHY THE DEFENSE SHOULD HAVE TO DO SOMETHING THAT IS NOT

10:05AM 7 REQUIRED.

10:05AM 8 AND, TWO, WHAT I DON'T WANT TO SEE HAPPEN, IS TO SEE ANY

10:05AM 9 DISCLOSURE THAT THE DEFENSE MAY MAKE CONSTRUED AS SOME SORT OF

10:05AM 10 WAIVER OF OUR RIGHT TO REST ON THE LANGUAGE OF 26.2 AND THE

10:05AM 11 LANGUAGE OF RULE 16(B) (2) (B) .

10:05AM 12 AND A COUPLE OF POINTS, YOUR HONOR.

10:05AM 13 YES, THE COURT DID MAKE THAT OBSERVATION WITH MS. SAHARIA,

10:05AM 14 BUT THE COURT NEVER RULED, AND CONSISTENT WITH THE LANGUAGE OF

10:05AM 15 RULE 26.2(F), COULD NOT RULE THAT ATTORNEY'S NOTES OR

10:05AM 16 ATTORNEY'S SUMMARIES ARE STATEMENTS WITHIN THE MEANING OF

10:05AM 17 26.2(F) .

10:05AM 18 I DON'T THINK, GIVEN OUR PENDING MOTION FOR DISCOVERY,

10:05AM 19 WHICH WE STILL REALLY DO CARE ABOUT, THAT WE ACKNOWLEDGE THAT

10:05AM 20 THE GOVERNMENT WAS OVERDISCLOSING MATERIAL.

10:05AM 21 WHAT I DID SAY IS THAT THE GOVERNMENT HAS OTHER

10:05AM 22 INDEPENDENT DISCLOSURE OBLIGATIONS THAT THE DEFENSE DOES NOT

10:05AM 23 SHARE.

10:05AM 24 AND, SECOND, I'VE HEARD NO RESPONSE TO THE POINT UNDER

10:06AM 25 RULE 16(B) (2) (B) THAT STATEMENTS MADE TO DEFENSE COUNSEL ARE

10:06AM 1 NOT DISCLOSABLE.

10:06AM 2 THE COURT: IS THE COMPENSATION, IF ANY,

10:06AM 3 DISCLOSABLE?

10:06AM 4 MR. BRECHER: SO THAT'S THE ISSUE, YOUR HONOR. I

10:06AM 5 DON'T THINK THOSE ARE STATEMENTS WITHIN THE MEANING OF 26.2.

10:06AM 6 AS I SAID, I'M NOT, AS I SIT HERE, DEEPLY CONCERNED ABOUT

10:06AM 7 SHARING THAT INFORMATION. I GUESS WE COULD SHARE IT.

10:06AM 8 BUT MY WORRY IS, WHAT ARE WE OPENING THE DOOR TO IF WE

10:06AM 9 START SHARING INFORMATION THAT I DON'T THINK IS CALLED FOR BY

10:06AM 10 THE RULES?

10:06AM 11 IS THE GOVERNMENT GOING TO TURN THAT AROUND ON US AND SAY,

10:06AM 12 WELL, NOW YOU'VE OPENED THE DOOR AND WE'RE ENTITLED TO

10:06AM 13 EVERYTHING AND YOU CAN'T RAISE A DEFENSE.

10:06AM 14 THE COURT: SO THE GOVERNMENT CAN ASK THE WITNESS

10:06AM 15 THEN, WHAT IS YOUR COMPENSATION, AND THE WITNESS COULD TESTIFY

10:06AM 16 ABOUT THAT?

10:06AM 17 MR. BRECHER: YES.

10:06AM 18 AND I THINK, YOUR HONOR, IT'S TYPICAL PRACTICE. I CAN'T

10:06AM 19 SPEAK FOR MY COLLEAGUES, BUT IT'S ALWAYS BEEN MY PRACTICE, WHEN

10:06AM 20 QUALIFYING AN EXPERT, TO ASK DURING THE COLLOQUY, ARE YOU BEING

10:06AM 21 COMPENSATED? WHAT IS THAT COMPENSATION? DOES IT AFFECT YOUR

10:07AM 22 OPINIONS TODAY, ET CETERA?

10:07AM 23 THE COURT: OKAY.

10:07AM 24 MS. VOLKAR: YOUR HONOR, TWO MORE POINTS I DIDN'T

10:07AM 25 HAVE A CHANCE TO MAKE THE LAST TIME I HAD THE MIKE. ONE WAS

10:07AM 1 RELATED TO THE 16(B) (2) (B) .

10:07AM 2 I THINK THAT THAT'S PARTICULARLY INTERESTING THAT THE

10:07AM 3 DEFENSE IS RELYING SO HEAVILY ON THAT WHEN THEY WANT TO

10:07AM 4 IGNORE -- AND I'M SORRY I DON'T HAVE IT AT MY FINGERTIPS -- BUT

10:07AM 5 RULE 16(A) (2), WHICH IS ONE OF THE CORE BASES FOR OUR

10:07AM 6 OPPOSITION TO THEIR DISCOVERY MOTION, WHICH IS THE WORK PRODUCT

10:07AM 7 OF PROSECUTORS. THEY, OF COURSE, WANT TO SAY WE WAIVED THAT

10:07AM 8 AND AT THE VERY TOP OF OUR BRADY LETTER WE SAY "WITHOUT WAIVING

10:07AM 9 ANY PRIVILEGES."

10:07AM 10 SO ALL OF THE BENEFITS THAT MR. BRECHER WANTS HERE,

10:07AM 11 THEY'RE NOT WILLING TO AFFORD TO THE GOVERNMENT IN TURN.

10:07AM 12 AND THE LAST THING THAT I WANT TO SAY, AND I HESITATE

10:07AM 13 BECAUSE I DON'T WANT TO REOPEN THE DOOR, BUT WHEN YOUR HONOR

10:07AM 14 ASKED, "IF YOU ARE GOING TO SAY TO MR. SONNIER 'WHY DIDN'T THE

10:07AM 15 GOVERNMENT DO THIS?' CAN'T THE GOVERNMENT RESPOND THAT THEY

10:07AM 16 DIDN'T HAVE THE REAL THING?!"

10:07AM 17 WE WOULD ALSO SAY THAT THE GOVERNMENT SHOULD BE ABLE TO

10:08AM 18 RESPOND WHY DIDN'T WE GET OR FOCUS MORE ON GETTING THE

10:08AM 19 FUNCTIONING COPY OF THE LIS? BECAUSE WE KNEW THERANOS VOIDED

10:08AM 20 ALL OF THE TEST RESULTS, BECAUSE WE HAD DR. DAS, BECAUSE WE HAD

10:08AM 21 ALL OF THE STUFF FROM CMS.

10:08AM 22 THERE IS A LOT OF OTHER INFORMATION OUT THERE AS WELL THAT

10:08AM 23 THE GOVERNMENT HAD IN ITS POSSESSION AT THE SAME TIME IT

10:08AM 24 COLLECTED WHAT IT THOUGHT WAS A WORKING COPY OF THE LIS.

10:08AM 25 AND I KNOW WE'RE NOT ARGUING THE FACTS, BUT I DON'T WANT

10:08AM 1 TO GET AWAY FROM THE EMPLOYEE OF THE GOVERNMENT THAT THEY KEEP
10:08AM 2 POINTING TO, THE FOUR OPTIONS, THE GOVERNMENT FOLLOWED TWO OF
10:08AM 3 THEM, ONE BEING A PERFECTLY REASONABLE ONE, WHICH WAS TO ASK
10:08AM 4 THERANOS TO GIVE -- OR THE ASSIGNEE FOR THERANOS TO GIVE A
10:08AM 5 WORKING COPY. SO I JUST DON'T WANT TO LET THAT VERY BASIC FACT
10:08AM 6 GO.

10:08AM 7 MR. BRECHER: BRIEFLY, YOUR HONOR.

10:08AM 8 FIRST, ON THE WORK PRODUCT ISSUE. WHEN YOU SEND A LETTER
10:08AM 9 DESCRIBING THE CONTENTS OF SOMETHING TO AN OPPOSING PARTY, YOU
10:08AM 10 HAVE BY DEFINITION SUBSTANTIALLY RAISED THE ODDS OF YOUR
10:08AM 11 OPPONENT LEARNING OF THAT INFORMATION. THAT IS A WORK PRODUCT
10:08AM 12 WAIVER.

10:09AM 13 SECOND, I WANT TO RESPOND TO RETURN TO THE THEME OF THE
10:09AM 14 GOVERNMENT'S PROPOSED REBUTTAL CASE. THAT IS THE WORST KIND OF
10:09AM 15 BOOTSTRAPPING. IT'S COMPLETELY IRRELEVANT. AND, INDEED,
10:09AM 16 DR. DAS WAS NOT INTERVIEWED BY THE GOVERNMENT UNTIL 2021.

10:09AM 17 SO THE NOTION THAT THEY WERE RELYING ON HIS CONCLUSIONS IN
10:09AM 18 MAKING A DECISION IN 2018, THAT MAKES NO SENSE.

10:09AM 19 THE COURT: OKAY. WELL, THANK YOU VERY MUCH FOR THE
10:09AM 20 CONVERSATION THIS MORNING. THE MATTER WILL BE UNDER
10:09AM 21 SUBMISSION.

10:09AM 22 WE'RE NEXT TOGETHER, I THINK, FRIDAY. AND YOU HAVE A
10:09AM 23 WITNESS TO CALL FRIDAY?

10:09AM 24 MR. BRECHER: WELL, WE DO, YOUR HONOR.

10:09AM 25 WELL, I'LL ALLOW MR. COOPERSMITH TO SPEAK.

10:09AM 1 THE ISSUE IS, YOUR HONOR, WE HAVE DISCLOSED MR. SONNIER AS
10:09AM 2 ONE OF OUR WITNESSES FOR FRIDAY. I CERTAINLY DON'T WANT TO
10:09AM 3 RUSH THE COURT'S DECISION, BUT I'LL JUST FLAG THAT THAT IS OUR
10:09AM 4 PRESENT INTENTION. WE KNOW THAT WE'LL NEED THE COURT'S LEAVE.
10:09AM 5 WE KNOW AT LEAST IN THEORY WE'LL NEED A DECISION ON THE
10:10AM 6 DISCOVERY MOTION, AND WE HOPE THAT OUR CLIENT AND OUR EXPERT
10:10AM 7 CAN REVIEW THOSE MATERIALS IF THEY WILL BE FORTHCOMING IN TIME
10:10AM 8 FOR US TO ASSESS BOTH WHETHER TO CALL THAT WITNESS AND WHETHER
10:10AM 9 TO PRESENT THIS DEFENSE, BECAUSE IT MAY BE RELEVANT.
10:10AM 10 THE COURT: DO YOU HAVE OTHER WITNESSES THAT YOU
10:10AM 11 COULD CALL IN THE INTERIM?
10:10AM 12 MR. BRECHER: I'LL DEFER TO MY COLLEAGUE ON THAT,
10:10AM 13 YOUR HONOR.
10:10AM 14 THE COURT: I'M TALKING ABOUT FRIDAY.
10:10AM 15 MR. BRECHER: YES.
10:10AM 16 MR. COOPERSMITH: THANK YOU, YOUR HONOR. YES, I
10:10AM 17 UNDERSTAND THE QUESTION.
10:10AM 18 WE HAVE DISCLOSED TO THE GOVERNMENT OTHER WITNESSES THAT
10:10AM 19 WE WOULD CALL ON FRIDAY, AND IT'S NO SECRET TO THE GOVERNMENT,
10:10AM 20 SO I DON'T MIND TELLING THE COURT EITHER.
10:10AM 21 IT'S ALSO ANOTHER EXPERT WE HAVE NOTICED, A MR. WEINGUST.
10:10AM 22 HIS TESTIMONY WOULD BE REGARDING THE VALUATION OF THERANOS'S
10:10AM 23 INTELLECTUAL PROPERTY AS OF THE TIME THAT MR. BALWANI LEFT THE
10:10AM 24 COMPANY. WE HAVEN'T HEARD ANYTHING FROM THE GOVERNMENT
10:10AM 25 OBJECTING TO THAT, BUT WE WOULD PLAN TO DO THAT.

10:10AM 1 WE ALSO HAVE SOME CUSTODIAN WITNESSES.

10:10AM 2 WE ARE -- WE HAVE SOME EMAILS OUT TO THE PROSECUTION TEAM.

10:11AM 3 I'M NOT SURE THEY'VE HAD A CHANCE TO RESPOND, BUT WE MIGHT TRY

10:11AM 4 TO GET STIPULATIONS TO AVOID FLYING CUSTODIANS ACROSS THE

10:11AM 5 COUNTRY OR FROM OTHER PLACES FOR TEN MINUTE TESTIMONY. WE'LL

10:11AM 6 SEE WHAT HAPPENS THERE.

10:11AM 7 AND THEN WE'LL HAVE TO, AT SOME POINT, MAKE A DECISION

10:11AM 8 ABOUT WHETHER MR. BALWANI IS GOING TO TESTIFY OR NOT.

10:11AM 9 I DON'T KNOW WHETHER THE WITNESSES THAT WE HAVE NOTICED

10:11AM 10 FOR FRIDAY -- OBVIOUSLY SOME OF IT DEPENDS ON THE COURT'S

10:11AM 11 RULING ON THE MATTER THAT WE JUST DISCUSSED.

10:11AM 12 THE COURT: SURE.

10:11AM 13 MR. COOPERSMITH: GO AHEAD, YOUR HONOR. I'M SORRY.

10:11AM 14 THE COURT: THANK YOU. PARDON ME.

10:11AM 15 I'M LOOKING AT OUR SCHEDULE, AND IT'S TRUNCATED, ISN'T IT?

10:11AM 16 WE HAVE FRIDAY AND THEN WE HAVE A WEEK OFF.

10:11AM 17 MR. COOPERSMITH: YES, YOUR HONOR.

10:11AM 18 THE COURT: AND IT -- MY SENSE IS THAT IF YOUR

10:11AM 19 EXPERT SONNIER WERE TO TESTIFY, HIS TESTIMONY WOULD NOT

10:11AM 20 COMPLETE IN ANY EVENT ON FRIDAY.

10:11AM 21 MR. COOPERSMITH: WELL, I DON'T KNOW WHAT THE CROSS

10:12AM 22 IS, AS USUAL, BUT I DON'T THINK THE TESTIMONY WE WOULD OFFER

10:12AM 23 THROUGH MR. SONNIER WOULD TAKE INORDINATELY LONG. I THINK

10:12AM 24 MR. BRECHER'S ESTIMATE WAS TWO HOURS. I THINK IT MIGHT BE EVEN

10:12AM 25 LESS THAN THAT.

10:12AM 1 SO I DON'T THINK THAT THAT FILLS THE DAY. WE HAVE THAT
10:12AM 2 OTHER EXPERT, MR. WEINGUST, WHO MIGHT FILL MORE OF THE DAY.
10:12AM 3 AND THEN I THINK, YOU KNOW, GIVEN THAT WE ONLY HAVE THE
10:12AM 4 ONE DAY, IF WE'RE AT A POINT WHERE WE HAVE TO DECIDE, WELL, WE
10:12AM 5 DON'T HAVE ANY MORE WITNESSES EXCEPT FOR THESE CUSTODIANS WHO
10:12AM 6 MAY NOT EVEN HAVE TO TESTIFY IF WE'RE ABLE TO REACH SOME
10:12AM 7 AGREEMENT WITH THE GOVERNMENT, THEN WE WOULD HAVE SOME TIME IN
10:12AM 8 THE AFTERNOON WHERE EITHER WE WOULD HAVE TO BREAK FOR THE DAY,
10:12AM 9 IF YOUR HONOR WANTED TO DO THAT, OR WE WOULD HAVE TO CALL
10:12AM 10 ANOTHER WITNESS. AND THE ONLY OTHER WITNESS WE MIGHT HAVE AT
10:12AM 11 SOME POINT IS MR. BALWANI.
10:12AM 12 THE COURT: WELL, I DON'T WANT YOU TO TELL ME ABOUT
10:12AM 13 ANY OF THAT. I'M NOT ASKING YOU TO REVEAL ANYTHING LIKE THAT.
10:12AM 14 MR. COOPERSMITH: YES, YOUR HONOR.
10:12AM 15 THE COURT: I DO RECOGNIZE THAT YOU WILL, AS YOU
10:12AM 16 TOLD ME, YOU'LL HAVE TO MAKE SOME DECISIONS, REVIEW WHAT IS
10:13AM 17 DISCOVERABLE, WHAT IS NOT, LOOK AT IT, AND MAKE A DECISION AS
10:13AM 18 TO WHAT NEXT STEPS ARE, INCLUDING WHETHER OR NOT YOU WANT TO
10:13AM 19 CALL YOUR EXPERT.
10:13AM 20 MR. COOPERSMITH: YES, YOUR HONOR.
10:13AM 21 THE COURT: AND YOU -- YOU KNOW, YOU NEED SOME TIME
10:13AM 22 TO DO THAT.
10:13AM 23 MR. COOPERSMITH: AND, YOUR HONOR, IF I FOLLOW THE
10:13AM 24 POINT I'M HOPING I'M GETTING AT, IS THAT WE HAVE A VERY -- YOU
10:13AM 25 KNOW, IT'S NOW MONDAY OBVIOUSLY. AND EVEN THOUGH FRIDAY IS AT

10:13AM 1 THE END OF THE WEEK, THERE'S A LOT TO ACCOMPLISH. I KNOW THE
10:13AM 2 COURT HAS SOME ISSUES TO CONSIDER AND TO BE THOUGHTFUL ABOUT
10:13AM 3 HOW YOU APPROACH THOSE.

10:13AM 4 WE ALSO HAVE THINGS THAT WE HAVE TO TALK ABOUT WITH THE
10:13AM 5 GOVERNMENT. THERE'S ANOTHER EXPERT. WE MAY HAVE SOME OTHER
10:13AM 6 MOTIONS WE HAVE TO FILE ABOUT SOME OTHER THINGS.

10:13AM 7 AND SO IT WOULD BE PERHAPS WISE TO GIVE EVERYONE MORE TIME
10:13AM 8 TO SORT OF GET EVERYONE'S ARMS AROUND THIS, TO NOT HAVE A
10:13AM 9 SESSION OR AS LONG A SESSION ON FRIDAY AND TO USE THAT TIME FOR
10:13AM 10 OTHER PURPOSES.

10:13AM 11 I MEAN, FOR EXAMPLE, WE'RE HAPPY TO BEGIN THE PROCESS OF
10:14AM 12 DISCUSSING JURY INSTRUCTIONS. THERE ARE OTHER THINGS TO
10:14AM 13 ACCOMPLISH. OBVIOUSLY, THIS IS ALL UP TO YOUR HONOR.

10:14AM 14 IF I FOLLOW THE COURT, THAT MIGHT BE ONE WAY TO APPROACH
10:14AM 15 THIS.

10:14AM 16 THE COURT: WELL, I WAS CURIOUS -- WELL, THANK YOU.
10:14AM 17 I WAS CURIOUS ABOUT WHETHER OR NOT YOU COULD PUT ANY OF YOUR
10:14AM 18 WITNESSES ON, AS AN ALTERNATIVE TO MR. SONNIER, FRIDAY?

10:14AM 19 MR. COOPERSMITH: RIGHT.

10:14AM 20 THE COURT: AND I DON'T WANT TO DISRUPT YOUR CASE
10:14AM 21 STRATEGY OR ANYTHING YOU WANT TO PUT ON. I RECOGNIZE THAT.

10:14AM 22 MR. COOPERSMITH: I APPRECIATE THAT, YOUR HONOR. I
10:14AM 23 DON'T REALLY MIND IF WE HAD TO CALL OTHER WITNESSES AND GIVE
10:14AM 24 THE COURT MORE TIME. THE PROBLEM IS THAT I DON'T THINK WE
10:14AM 25 WOULD HAVE ENOUGH WITNESSES TO FILL THE DAY, UNLESS WE MADE A

10:14AM 1 DECISION TO CALL MR. BALWANI, WHICH I CAN'T -- I DON'T KNOW

10:14AM 2 YET, RIGHT?

10:14AM 3 THE COURT: RIGHT. OKAY.

10:14AM 4 MR. SCHENK.

10:14AM 5 MR. SCHENK: THANK YOU, YOUR HONOR.

10:14AM 6 I RISE JUST TO SPEAK ON THE SCHEDULING ISSUES THAT THE

10:14AM 7 COURT IS NOW DISCUSSING.

10:14AM 8 I THINK THE GOVERNMENT'S VIEW IS WE NEED TO TAKE ADVANTAGE

10:14AM 9 OF THE DAYS THAT WE HAVE. WE IMPANELLED THE JURY THE BEGINNING

10:15AM 10 OF MARCH, AND WE GAVE THEM A TRIAL ESTIMATE OF A CERTAIN NUMBER

10:15AM 11 OF WEEKS, AND WE HAVE SINCE GIVEN THEM AN OPPORTUNITY TO OFFER

10:15AM 12 TO US ADDITIONAL DAYS THAT THEY COULD ADD TWO WEEKS.

10:15AM 13 AND AS THE COURT HAS SEEN, THIS JURY HAS BEEN PRETTY

10:15AM 14 RESISTANT -- OR AT LEAST SOME OF THE MEMBERS OF THE JURY, TO BE

10:15AM 15 FAIR. I THINK MANY OF THEM HAVE BEEN AVAILABLE TO ADD DAYS,

10:15AM 16 BUT WE HAVE NOT BEEN ABLE TO GET THE FULL PANEL WILLING TO ADD

10:15AM 17 DAYS.

10:15AM 18 AND WE SAW HEALTH ISSUES COME UP IN OUR LAST WEEK OF

10:15AM 19 TRIAL. MORE THAN ONE DAY WE SPENT AN ALTERNATE.

10:15AM 20 AND THE GOVERNMENT'S VIEW REALLY IS THAT THE COURT HAS SET

10:15AM 21 ASIDE AND FOR A LONG TIME INFORMED THIS JURY THAT THIS FRIDAY

10:15AM 22 WAS GOING TO BE A TRIAL DAY.

10:15AM 23 I ASSUMED THAT CAUSED THIS JURY TO MAKE OR ADJUST TRAVEL

10:15AM 24 PLANS. THIS COMING WEEKEND IS A HOLIDAY WEEKEND, AND WE TOLD

10:15AM 25 THEM THAT FRIDAY WAS A TRIAL DAY. I THINK FRIDAY SHOULD REMAIN

10:16AM 1 A TRIAL DAY.

10:16AM 2 AND I APPRECIATE THAT THERE IS WORK THAT NEEDS TO BE DONE

10:16AM 3 WITH REGARD TO MR. SONNIER AND THE ADMISSIBILITY OF CERTAIN

10:16AM 4 TESTIMONY, BUT IF THE DEFENSE NEEDS TO REVISE THEIR WITNESS

10:16AM 5 LIST THAT THEY PROVIDED US TO COVER FRIDAY, THEY SHOULD DO THAT

10:16AM 6 IMMEDIATELY. AND I THINK IT'S OUR EXPECTATION THAT WE'RE GOING

10:16AM 7 TO BE HERE FOR A FULL DAY ON FRIDAY.

10:16AM 8 THE COURT: WELL, THANK YOU.

10:16AM 9 I'D LIKE TO HAVE TESTIMONY FRIDAY IF WE CAN. I'D LIKE TO

10:16AM 10 DO THAT.

10:16AM 11 THIS WEEK IS -- I THINK I TOLD YOU, I HAVE NINTH CIRCUIT

10:16AM 12 COMMITTEE OBLIGATIONS TOMORROW AND WEDNESDAY. SO THE COURT --

10:16AM 13 I WON'T BE HERE. I'LL BE IN SAN DIEGO.

10:16AM 14 THURSDAY I HAVE A CIVIL CALENDAR. AS YOU KNOW, WE'RE

10:16AM 15 TYPICALLY DARK ON THURSDAYS BECAUSE OF OUR CIVIL CALENDAR. SO

10:16AM 16 IT PUTS SOME, SOME PRESSURE ON THE COURT TO GET YOU THE

10:16AM 17 INFORMATION THAT YOU NEED, AND THAT'S WHY I SCHEDULED THIS,

10:17AM 18 THIS MORNING AT 8:30 SO WE COULD CAPTURE SOME TIME, AND I MOVED

10:17AM 19 SOME CASES SO WE COULD DO THE BEST WE CAN TO KEEP THINGS GOING.

10:17AM 20 SO I WOULD LIKE TO HAVE SOME TESTIMONY ON FRIDAY, AT LEAST

10:17AM 21 AS MANY WITNESSES AS YOU THINK YOU CAN ACCOMPLISH.

10:17AM 22 MR. COOPERSMITH: YES, YOUR HONOR. I THINK WE COULD

10:17AM 23 CALL OTHER WITNESSES. I MENTIONED MR. WEINGUST, POSSIBLY SOME

10:17AM 24 CUSTODIANS DEPENDING ON HOW THAT GOES.

10:17AM 25 THE COURT: SURE.

10:17AM 1 MR. COOPERSMITH: AND THEN WE'LL -- MR. SCHENK IS
10:17AM 2 RIGHT, IF WE HAVE TO REVISE THE WITNESS LIST, WE WILL DO SO AT
10:17AM 3 THE EARLIEST POSSIBLE OPPORTUNITY.
10:17AM 4 BUT WITH REGARD TO MR. SONNIER, THERE ARE SOME ISSUES.
10:17AM 5 THERE'S THE DISCOVERY ISSUE THAT IS PENDING. AND OBVIOUSLY IF
10:17AM 6 THAT DISCOVERY IS ALLOWED AND WE RECEIVE THE UNDERLYING EMAILS,
10:17AM 7 THEN THAT'S SOMETHING THAT MR. SONNIER WOULD HAVE TO REVIEW, WE
10:17AM 8 WOULD HAVE TO SORT OF ADJUST THINGS.
10:17AM 9 WE CAN CALL WITNESSES OTHER THAN MR. SONNIER. BUT WHAT WE
10:17AM 10 DON'T WANT TO BE IN A POSITION OF -- WE WANT TO PUT ON OUR
10:17AM 11 DEFENSE AS WE'RE ALLOWED TO PRESENT IT, AND WE DON'T THINK THAT
10:18AM 12 IT WOULD BE FAIR TO PUT US IN A POSITION WHERE THE ONLY WITNESS
10:18AM 13 WE COULD CALL, YOU KNOW, IS OUR CLIENT, AND WE HAVEN'T MADE
10:18AM 14 THAT DECISION.
10:18AM 15 SO WE WOULD PUT ON AS MANY OTHER WITNESSES THAT WE COULD,
10:18AM 16 AND IF WE COULDN'T CALL MR. SONNIER BECAUSE THE COURT HASN'T
10:18AM 17 REACHED A DECISION OR WE JUST DON'T HAVE ENOUGH TIME TO PREPARE
10:18AM 18 HIM, WE WOULD HOPE THAT THE COURT WOULD GIVE US SOME INDULGENCE
10:18AM 19 TO JUST, YOU KNOW, NOT FILL THE WHOLE DAY FRIDAY RATHER THAN
10:18AM 20 START --
10:18AM 21 THE COURT: RIGHT. THAT'S WHERE I WAS GOING AS
10:18AM 22 WELL.
10:18AM 23 JUST BECAUSE OF THE TIME CRUNCH OF ALL OF THIS, YOU KNOW,
10:18AM 24 ALL OF US WOULD BE GRATEFUL IF THE DEFENSE FEELS THAT YOU COULD
10:18AM 25 CALL ALTERNATIVE WITNESSES ON FRIDAY, WE'LL GET THROUGH AS MANY

10:18AM 1 AS WE CAN.

10:18AM 2 I DON'T THINK OUR JURY WOULD OBJECT TO BEING RELEASED

10:18AM 3 EARLY ON A FRIDAY BEFORE A THREE DAY WEEKEND HOLIDAY.

10:18AM 4 MR. COOPERSMITH: YES, YOUR HONOR.

10:18AM 5 THE COURT: AND THAT NEXT WEEK WE'RE DARK, AND THAT

10:18AM 6 WOULD GIVE THE DEFENSE TIME TO DIGEST THE COURT'S RULING AND DO

10:18AM 7 WHATEVER YOU NEED TO DO SUCH THAT YOU'LL MAKE DECISIONS ON

10:18AM 8 WITNESSES GOING FORWARD.

10:19AM 9 MR. COOPERSMITH: YES, YOUR HONOR.

10:19AM 10 THE COURT: SO IT -- WE HAVE THAT BIG BREAK NEXT

10:19AM 11 WEEK, AND I'M PAUSING BECAUSE WE ALSO NEED TO SCHEDULE A

10:19AM 12 CHARGING CONFERENCE AT SOME POINT IN TIME.

10:19AM 13 MR. COOPERSMITH: YES, YOUR HONOR.

10:19AM 14 THE COURT: AND I'LL LOOK AT THAT AS WELL.

10:19AM 15 MR. COOPERSMITH: THANK YOU.

10:19AM 16 THE COURT: THANK YOU.

10:19AM 17 ANYTHING ELSE?

10:19AM 18 MR. BRECHER: NOTHING FROM THE DEFENSE, YOUR HONOR.

10:19AM 19 THE COURT: THANK YOU.

10:19AM 20 MR. SCHENK: YOUR HONOR, THERE IS ONE ISSUE.

10:19AM 21 THE COURT: MR. BOSTIC.

10:19AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR. GOOD MORNING.

10:19AM 23 LAST NIGHT THE DEFENSE FILED AN ADDITIONAL MOTION THAT I

10:19AM 24 BELIEVE IS NOTICED FOR 11:30 TODAY.

10:19AM 25 I'M NOT SURE WHAT THE DEFENSE'S INTENTION OR THE COURT'S

10:19AM 1 PREFERENCES ARE WITH RESPECT TO THE SCHEDULING OF THAT MOTION.

10:19AM 2 WE PREVIOUSLY HAVE BEEN IN DISCUSSIONS ABOUT THE EXHIBIT

10:19AM 3 THAT THE DEFENSE IS SEEKING TO EXHIBIT. I HAVE HAD A CHANCE TO

10:19AM 4 REVIEW THE MOTION.

10:19AM 5 I THINK THAT THE PARTIES MIGHT BENEFIT FROM SOME

10:20AM 6 ADDITIONAL MEET AND CONFER TIME ON THAT.

10:20AM 7 IN SHORT, THE GOVERNMENT DOESN'T THINK IT WILL BE

10:20AM 8 NECESSARY TO CALL A DOCUMENT CUSTODIAN. I'VE CONVEYED THAT

10:20AM 9 PREVIOUSLY TO THE DEFENSE, BUT I'M NOT SURE WHETHER WE NEED TO

10:20AM 10 HAVE THAT ARGUMENT AT 11:30 OR WHETHER IT MIGHT MAKE SENSE TO

10:20AM 11 ALLOW THE PARTIES TO DISCUSS IT MORE. I DON'T THINK THAT'S

10:20AM 12 SOMETHING THAT WOULD NEED TO BE RESOLVED BEFORE FRIDAY, BUT I'M

10:20AM 13 CURIOUS ON THE COURT'S AND THE DEFENSE'S THOUGHTS.

10:20AM 14 THE COURT: RIGHT. THANK YOU.

10:20AM 15 AS YOU RECALL, AND AS NOTICED IN THE MOTION, THE COURT DID

10:20AM 16 NOT ADMIT THAT DOCUMENT BECAUSE IT WAS AN EXCEL SHEET THAT WAS

10:20AM 17 SOMEWHAT CUT UP, AND IT WAS DIFFICULT TO TRACK, NOT IMPOSSIBLE

10:20AM 18 BUT DIFFICULT.

10:20AM 19 AND I THINK THE WAY IT WOULD BE PRESENTED, IT WAS MULTIPLE

10:20AM 20 PAGES. THE JURY WOULD HAVE A DIFFICULT TIME LOOKING AT THAT.

10:20AM 21 YOU HAVE CORRECTED THAT I THINK.

10:20AM 22 MR. COOPERSMITH: YES, YOUR HONOR.

10:20AM 23 THE COURT: AND WHAT YOU OFFER NOW IS A SOLID ONE

10:21AM 24 PIECE. YOU CAN GO HORIZONTALLY ACROSS AND FILL IN ALL OF THE

10:21AM 25 AREAS.

10:21AM 1 MR. COOPERSMITH: YES, YOUR HONOR.

10:21AM 2 THE COURT: AND SO THAT'S THE ISSUE NOW I TAKE IT.

10:21AM 3 MR. COOPERSMITH: YES, YOUR HONOR.

10:21AM 4 AND IT'S VERY HELPFUL OF MR. BOSTIC TO SAY WE WOULDN'T

10:21AM 5 HAVE TO CALL A CUSTODIAN TO FLY SOMEONE UP HERE, SO WE CAN TELL

10:21AM 6 THAT PERSON, I'M SURE SHE'LL BE DELIGHTED, THAT SHE DOESN'T

10:21AM 7 HAVE TO COME TO COURT.

10:21AM 8 I DON'T KNOW IF THERE'S ANY REMAINING ISSUES AS TO THAT.

10:21AM 9 BUT WHEN WE NOTICED THE MOTION FOR 11:30 TODAY, WE WERE

10:21AM 10 NOT TRYING TO PUT PRESSURE ON THE COURT. WE ALWAYS SAY IN

10:21AM 11 THOSE, OBVIOUSLY IT'S AT SUCH TIME THAT THE COURT CAN TAKE UP,

10:21AM 12 EVEN IF IT'S NOT 11:30.

10:21AM 13 I'M HAPPY TO CONFER FURTHER WITH MR. BOSTIC, AND HOPEFULLY

10:21AM 14 WE CAN REACH SOME AGREEMENT ON THAT. AND IF NOT, THEN WE WILL

10:21AM 15 TAKE IT UP WITH YOUR HONOR WHEN YOUR HONOR IS AVAILABLE.

10:21AM 16 THE COURT: WE CAN TALK ABOUT THIS FRIDAY THEN. I

10:21AM 17 DON'T THINK THIS IS SOMETHING THAT YOU'RE GOING TO HAVE

10:21AM 18 TESTIMONY ON.

10:21AM 19 MR. COOPERSMITH: YES. THAT'S ABSOLUTELY FINE.

10:21AM 20 THE COURT: ALL RIGHT. THANK YOU.

10:21AM 21 MR. COOPERSMITH: THANK YOU, YOUR HONOR.

10:22AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR.

10:22AM 23 (COURT ADJOURNED AT 10:22 A.M.)

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3 CERTIFICATE OF REPORTER
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6

7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
13 ABOVE-ENTITLED MATTER.

14 
15

16

IRENE RODRIGUEZ, CSR, RMR, CRR
17 CERTIFICATE NUMBER 8074
18

19 DATED: MAY 23, 2022
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